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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

~~BABY GIRL S., and~~ DONALD J. KIRKPATRICK,

Petitioners,

—VS.—

CHRISTIAN HOMES OF ABILENE, INC., and the 326th DISTRICT COURT OF TAYLOR COUNTY, TEXAS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTIONS PRESENTED FOR REVIEW

1. May Texas terminate the parent-child relationship between a concerned and competent parent and his infant out-of-wedlock daughter without demonstrating either parental unfitness or any potential harm to the child pursuant to the conclusory standard of best interests of the child?

2. May Texas apply an unfitness standard to termination proceedings involving both in-wedlock fathers and out-of-wedlock mothers, but apply a best interests of the child standard in termination proceedings involving out-of-wedlock fathers seeking to fulfill their parental responsibilities?

3. May Texas require an out-of-wedlock father to satisfy a burden of proving

that his child's best interests would be served by recognizing him as a "legal" as well as a biological father?

THE PARTIES

The parties to this proceeding are listed in the caption. Throughout these proceedings, the child in question has been referred to as Baby Girl S.

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OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals is reported at 628 S.W.2d 261 (Tex. Ct. App. 1982) and is set forth in Petitioner's Appendix at pp. A-5 through A-17. The Texas Supreme Court did not issue an opinion. Its orders denying a writ of error and denying rehearing are set forth in Petitioner's Appendix at A-20 and A-21, respectively.

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. §1257(3) to review an order of the Supreme Court of Texas entered July 14, 1982 denying rehearing of an order denying a writ of error entered June 16, 1982.

CONSTITUTIONAL PROVISIONS

AMENDMENT IV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

Texas Family Code §13.21. Voluntary Legitimation.

(a) If a statement of paternity has been executed by the father of an illegitimate child, the father or mother of the child or the Texas Department of Human Resources may file a petition for a decree designating the father as a parent of the child. The statement of paternity must be attached to the petition.

(b) The court shall enter a decree designating the child as the legitimate child of its father and the father as a parent of the child if the court finds that:

(1) the parent-child relationship between the child and its original mother has not been terminated by a decree of a court;

(2) the statement of paternity was executed as provided in this chapter, and the facts stated therein are true; and

(3) the mother or the managing conservator, if any, has consented to the decree.

(c) The requirement of consent of the mother is satisfied if she is the petitioner. If the entry of the decree is in the best interest of the child, the court may consent to the legitimation of the child in lieu of the consent of the mother or managing conservator.

(d) A suit for voluntary legitimation may be joined with a suit for termination under Chapter 15 of this code.

(e) A suit under this section may be instituted at any time.

STATEMENT OF THE CASE

In this case Texas asserts power to sever the parental relationship between a concerned and competent father anxious to assume his parental responsibilities and his out of wedlock infant daughter solely because the father has failed to persuade a judge that the best interests of the child would be served by recognizing him as a "legal" parent.

Under Texas law, a "legal" parent's relationship with his or her child may not be terminated by the State in the absence of a specific finding of parental unfitness. Texas Family Code, §15.02. The biological father of a child born out of wedlock is not, however, a "legal" parent in Texas unless and until a court enters an order of legitimation. Legitimation may take place involuntarily pursuant to a

proceeding against the father designed to establish his obligation of support, Texas Family Code §13.08; or voluntarily, pursuant to a proceeding initiated by the father. Texas Family Code, §13.21. If, in response to a father's legitimation petition, the mother withholds her consent -- often, as in this case, because she wishes to place the child for adoption with third persons -- the biological father will not be granted the status of a "legal" parent unless he carries the burden of persuading the court that legitimation would be in the best interest of the child. Texas Family Code §13.21(c).

The father in such a setting may, therefore, be deprived of the ability to raise his child, not because he has been found unfit, but solely because he has failed to satisfy the virtually

standardless burden of proof which Texas law imposes upon him.

The petitioner in this case is the father of an infant girl born out of wedlock on January 11, 1981 whose mother relinquished her at birth for adoption. When Christian Homes of Abilene, Inc., moved to confirm the natural mother's relinquishment for adoption, petitioner cross-moved for an order of voluntary legitimation in order to raise the child himself. Texas Family Code, §13.21(a). The trial was held on August 18, 1981, and the state court appellate process was completed on July 14, 1982.

The record in the trial court[1]

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[1]The findings of fact and conclusions of law of the trial court are set forth in the Appendix at pp. A-1 through A-4. The opinion of the Texas Court of Civil Appeals is set forth in the Appendix at pp. A-5

establishes that petitioner is a 25 year-old farmer who resides in York County, Nebraska, who has repeatedly sought to accept full parental responsibility for the raising of his child.

When petitioner learned that the child's mother, who was 16 years old at the time of trial, might be pregnant, he immediately asked her to marry him. (Tr. 16, 41) Her parents refused to give their permission and, instead, sent the young woman to a home for unwed mothers, operated by Christian Homes of Abilene, Inc., in Texas.

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[1](continued)

through A-17. The orders of the Supreme Court of Texas denying review and rehearing are set forth at pp. A-20 and A-21. Citations to the Transcript of Proceedings in the trial court are denominated (Tr.___). Citations to petitioner's Appendix are denominated (A-___).

(Tr. 128) Petitioner then tried, unsuccessfully, to pay the mother's expenses at the home, sent her money, and corresponded with her regularly. (Tr. 24, 63, 86) He continually expressed his love for his child and when he learned that the child's mother was planning to relinquish the baby for adoption, made it clear that he wanted to raise the baby himself. (Tr. 30, 44)[2] After the baby was born, he began depositing money for his child's support with the court. (Tr. 80-81) At trial, petitioner testified:

All I can say is I love my daughter

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[2]The natural mother had sought to persuade petitioner to consent to the adoption by telling him often throughout her pregnancy, "If you don't give this child up for adoption, you don't love me." (Tr. 27) Despite these entreaties, which caused him to waver on occasion (Tr. 74), petitioner refused to consent to relinquishment of his parental status. (Tr. 74)

> and I want her, and she's blood, and I just can't see letting her go when I want to raise her myself. (A-7)

Petitioner lives with his parents and two sisters on the family farm in Nebraska. He has lived there his entire life and will eventually inherit an interest in the farm. His parents testified that they would help their son raise their grandchild. (Tr. 100, 101, 104, 117). At the request of the trial court, an investigation of petitioner's home was conducted by a Nebraska social worker who concluded that petitioner could adequately care for his daughter (Tr. 188) and that he suffered from a medically controlled form of epilepsy (Tr. 37, 106).

The child's 16 year old mother testified that she was withholding her consent to the baby's legitimation because she wanted the child adopted by "two Christian

parents." (Tr. 54-55) She acknowledged that petitioner is "a wonderful man . . . a good man, a hard worker" (Tr. 63), but testified that he would not be as well suited to raise his daughter as would adoptive parents because he is often unclean after working in the fields, smokes, uses bad language on occasion, does not keep his home clean and lacks her religious conviction. (Tr. 35-37) Her father also testified that the baby's presence in the natural mother's home town in Nebraska would constitute an embarrassment to the family. (Tr. 151)

No evidence was presented even suggesting that petitioner is unfit to raise his child or that she would suffer any harm as a consequence of being raised by her biological father.

On September 27, 1981, the trial court entered judgment denying petitioner's request for legitimation based solely on a conclusory finding that "It is not in the best interest of the child for this court to consent to the legitimation . . ." (A-2) Unless reversed, the decision of the trial court means that petitioner's infant daughter will be subject to adoption by unknown third persons.

Petitioner appealed to the Texas Court of Civil Appeals for the Eleventh Judicial District on the grounds that the decision of the trial court was against the weight of the evidence and that Texas Family Code §13.21 violates an unwed father's rights under the equal protection and the due process clauses of the Fourteenth Amendment. On February 11, 1982, the Court of Civil Appeals affirmed the trial court's judgment.

(A 5-17) On June 16, 1982, the Texas Supreme Court denied petitioner's application for a writ of error concerning inter alia, his Fourteenth Amendment due process and equal protection claims, and on July 14, 1982, denied his petition for rehearing. (A-20, 21). The timely filing of this petition pursuant to 28 U.S.C. §1257(3) followed.

REASONS FOR GRANTING THE WRIT

This case poses with special poignancy an unsettled constitutional question of extraordinary importance which this Court has frequently noted, but never squarely confronted:[3] What is the minimum substantive standard pursuant to which a State may terminate a parent-child relationship?

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[3]This Court has alluded to the problem of defining a constitutionally acceptable substantive standard in parent-child termination proceedings on numerous occasions. E.g. Stanley v. Illinois, 405 U.S. 645 (1972); Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Quilloin v. Wolcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380, 394 n.16 (1979). See also, Doe and Roe v. Delaware, prob. jur. noted, 445 U.S. 942 (1980), app. dism. for want of a properly presented federal question, 450 U.S. 382 (1981); Johnson v. J.O.L., cert. granted, 449 U.S. 818, (1980), judgment vacated and case remanded, 449 U.S. 989, (1980). See generally, Lehman v. Lycoming County Children's Services Agency, U.S. , 73 L.Ed.2d 928 (1982); In re William, 477 Pa. 322, 383 A.2d 1228 cert.

Given the concededly protected nature of the parent-child relationship, it is clear that some constitutionally imposed minimum threshold must be crossed by the State before the relationship may be terminated. What is not clear is the precise nature of that threshold.[4] In Lassiter v. Department of Social Services, 452 U.S. 18 (1981) and Santosky v. Kramer, ___U.S.___ 71 L.Ed.2d 599 (1982), this Court clarified the procedural safeguards which must accompany an attempt to sever a parent-child relationship. Procedural safeguards

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[3](continued)

den. sub. nom., Lehman v. Lycoming County Children's Services Agency, 439 U.S. 880 (1978). See generally, Prince v. Massachusetts, 321 U.S. 158 (1944); Moore v. East Cleveland, 431 U.S. 494 (1977).

[4]See, Caban v. Mohammed, 441 U.S. 380, 414-415 (1979) (Stevens, J., Burger Ch.J. and Rehnquist J., dissenting).

cannot operate effectively, however, when confusion reigns as to the appropriate substantive standard. Since the "best interest" standard used by the court below is both unduly permissive[5] and wholly conclusory,[6] it fails to satisfy the constitutional minimum imposed by the Due Process Clause.

Moreover, whatever substantive standard a State adopts to govern the termination of a parent-child relationship, the Equal Protection Clause requires that it be fairly applied across the spectrum of parent-child relationships. Caban v. Mohammed, 441 U.S. 380 (1979). Texas effects a dual discrimination in the

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[5] See, infra at pp. 16-22.

[6] See, infra at pp. 22-27.

application of its substantive standard. "First, children born in wedlock may be the subject of a termination petition only if their parents are shown to be "unfit", while children born out of wedlock may be permanently separated from their fathers pursuant to a vague and conclusory "best interest" test. Texas Family Code §13.21(c). Second, mothers of out of wedlock children may be the subject of a termination proceeding only if they are shown to be unfit, while fathers of children born out of wedlock are subject to the amorphous "best interest" test. Thus, the Texas practice discriminates on the basis of sex[7] and illegitimacy[8] in the choice of a governing

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[7] See, infra, at pp. 28-34.

[8] See, infra, at pp. 34-38.

standard in parent-child termination proceedings. Where, as here, a parent has made every effort to assume responsibility for the care and upbringing of his child, such discrimination cannot pass constitutional muster.

Finally, in Santosky v. Kramer, ___U.S.___ 71 L.Ed.2d 599 (1982), this Court ruled that the due process clause requires the State to satisfy its persuasion burden in a termination proceeding by clear and convincing evidence. The Texas procedure at issue herein not only fails to require the State to establish its case by clear and convincing evidence, it actually places the persuasion burden on the parent in flat disregard of Santosky.

I. THE SUBSTANTIVE STANDARD UTILIZED BY TEXAS TO TERMINATE PETITIONER'S PARENT-CHILD RELATIONSHIP IS VIOLATIVE OF DUE PROCESS OF LAW BECAUSE

(A) IT FAILS TO REQUIRE A SHOWING OF PARENTAL UNFITNESS AND POTENTIAL HARM TO THE CHILD; AND

(B) IT IS WHOLLY CONCLUSORY AND, THUS, IS UNCONSTITUTIONALLY VAGUE.

This Court has repeatedly stressed the basic social and personal importance of the parent-child relationship, and the concomitant constitutional necessity for exceptionally precise and careful fact-finding whenever the state seeks to end that relationship. See, e.g., Lassiter v. Department of Social Services, 452 U.S. 18 (1981); Santosky v. Kramer, ___U.S.___ 71 L.Ed.2d 599 (1982). Yet, in stark contrast, the Texas statute at issue in this case, Texas Family Code §13.21, permits the state to terminate the bond between a loving parent who wishes to

assume his parental responsibilities and his infant daughter without any showing of potential harm to the child, and without providing any directions to guide or control the judicial decision-maker's discretion beyond the requirement that his decision accord with his own personal and subjective sense of what is in the child's immediate "best interest." This statute, which allows a court to work a "unique kind of deprivation," Lassiter, supra, 452 U.S. at 27, raises two serious due process issues which deserve plenary consideration by this Court.

A. A State May Not Terminate The Relationship Between A Competent and Caring Biological Parent And His Or Her Child Without Showing Parental Unfitness.

The Court has long adhered to the principle that the parent-child bond is a fundamental human relationship with which

the state may interfere only when it asserts a powerful justification and then only in the least intrusive manner. E.g. Prince v. Massachusetts, 321 U.S. 158 (1944); Moore v. East Cleveland, 431 U.S. 494 (1977); Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Lassiter v. Department of Social Services, supra; Santosky v. Kramer, supra; Stanley v. Illinois supra; Zablocki v. Redhail, 434 U.S. 374 (1978); Cleveland Board of Ed. v. LaFleur, 414 U.S. 632 (1974).[9]

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[9] The Court has repeatedly emphasized that the right to a parent-child relationship is a reciprocal one, inhering in both parent and child, Smith v. Organization of Foster Families, supra at 846, and has made clear that this interest is not automatically diminished because the parent involved in a given case may be a father concerned with his illegitimate child. See, e.g. Stanley v. Illinois, supra at 651-52; Caban v. Mohammed, 441 U.S. 380 (1979).

Obviously, if the State demonstrates that a parent is unfit, the State may have both a right and a duty to act to terminate the parental relationship.[10] Equally obviously, if a parent has virtually abandoned a child, his or her claim to continued nominal parental status is hardly persuasive. Quilloin v. Wolcott, 434 U.S. 246 (1978). Thus, in Caban, this Court noted:

> In those cases where the father never has come forward to participate in the rearing of a child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child." 441 U.S. at 392.

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[10] Of course, the drastic expedient of parental termination must be surrounded by strict procedural safeguards, e.g. Stanley v. Illinois, 405 U.S. 645 (1972); Santosky v. Kramer, ___ U.S. ___, 71 L.Ed.2d 599 (1982) and should take place only if less drastic means of repairing the fabric of the family are unavailing.

However, when the State has demonstrated neither unfitness, nor potential harm to the child nor parental default, it lacks power to sever a biological relationship between a loving father and his infant daughter merely because a judge thinks that the child's best interest would be served by raising that daughter in a two-parent Christian home. In Quilloin v. Wolcott, 434 U.S. 246 (1978), this Court made clear that the permissive standard which governs the termination of parents who have virtually abandoned their children cannot be constitutionally applied to parents who have demonstrated both the willingness and the ability to accept parental responsibility.[11] Thus, without squarely

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[11] Quilloin v. Wolcott, supra, at 255.

ruling on the point, this Court expressed "little doubt" in Quilloin:

> ...that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the child's best interest. 434 U.S. at 255.

Similarly, in Caban v. Mohammed, 441 U.S. 380 (1979), Justice Stevens noted that while a best interest standard may govern termination cases where an absentee father has taken no steps to legitimate his child, the Due Process Clause may well require a more rigorous standard when the State seeks to move against a father like the petitioner, who has gone to extraordinary lengths to

accept parental responsibility. Caban v. Mohammed, supra, at 415-16 (Stevens, J., Burger, Ch.J. and Rehnquist, J., dissenting).

Finally, in Santosky v. Kramer, ___U.S.___, 71 Ed.2d. 599 (1982), four members of this Court assumed that the remaining five:

> ...probably would balk at a state scheme that permitted termination of parental rights on a clear and convincing showing merely that such action would be in the best interests of the child. See Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 862-63 (1977)(Stewart, J., concurring). ___U.S. at ___, 71 L.Ed.2d at 619 (Rehnquist, J., Burger, Ch.J., White, J. and O'Connor, J. dissenting).[12]

In cases like this, where a father

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[12] Texas not only fails to require proof by clear and convincing evidence; it actually shifts the persuasion burden on the best interests issue to the father. See infra at 39.

admits paternity and is both willing and able to assume full parental responsibility, the State must make more than the flimsy showing below to justify the drastic expedient of terminating a parental relationship. Unlike settings where an unwed father is either unable or unwilling to assume full parental responsibility, petitioner offers his child a stable, concededly adequate, home. No State interest whatever exists to justify the termination of petitioner's parental relationship with his daughter.

B. The Best Interest Standard is Unconstitutionally Vague In The Context Of Termination Proceedings.

When the State seeks to terminate a parent-child bond it intrudes upon one of the most intensely protected relationships known to our legal and social system. When the State seeks to act in so sensitive an

area, traditional principles of constitutional law require that it define the governing substantive standard with care and precision. E.g. Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Smith v. Goguen, 415 U.S. 566 (1974). See also, Colautti v. Franklin, 439 U.S. 379 (1978). See generally, Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U.Pa.L. Rev. 67 (1960). One can hardly imagine a standard more violative of the void-for-vagueness doctrine than the wholly conclusory "best interest of the child" standard applied in this case. Devoid of objective meaning, the best interest standard (if it can be called a standard at all) is merely an invitation to subjective decision-making.

This Court has recognized that the ban on vague statutes which impinge upon

significant constitutional values is designed to effectuate three policies.

First, the void-for-vagueness doctrine assures that the target of adverse government action will be given fair notice. E.g., Lanzetta v. New Jersey, 306 U.S. 451 (1939). Were petitioner to have scrutinized the Texas statute at issue herein, he would have been utterly unable to ascertain what Texas wished him to do in order to persuade the court to allow him to raise his child. In effect, petitioner has lost his child without ever having been told why.

Second, the vagueness doctrine is designed to prevent the arbitrary, unequal and discriminatory application of the law by insisting upon objective criteria calculated to limit the discretion of implementing

officials. E.g. Smith v. Goguen, 415 U.S. 566 (1974); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Unfortunately, however, the wholly conclusory nature of a best interest standard for termination virtually invites the arbitrary, unequal and discriminatory application of the law: Arbitrary, in that the standard is purely subjective in nature; unequal, in that the standard will necessarily vary radically from one judge to another; and discriminatory, in that the standard validates the role of subjective prejudice and stereotypical thinking in the termination process.

Third, the vagueness doctrine is a modern analogue of the traditional ban on excessive legislative delegation. An overly vague statute necessarily delegates the power to make law to an executive or, as

here, a judicial official. Where, as here, the law impinges on a fundamental value, classic separation of powers analysis insists that the policy be articulated by a legislative body. Cf., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Thus, the best interest standard effectively transfers the power to enunciate policy governing parent-child termination from the legislature, where it belongs, to the judiciary, where it does not.

Since the use of a best interest standard in parent-child termination cases[13]

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[13] This Court has repeatedly noted the serious vagueness problems inherent in a best interest termination standard. E.g. Smith v. Organization of Foster Families, 431 U.S. 816 (1977) at 835, n.36 ("judges... may find it difficult, in utilizing vague standards like 'the best interests of the child' to avoid decisions resting on subjective values"); Belloti v. Baird, 443 U.S. 628 (1979) at 655-56 (a best interest

violates all three policies advanced by the void-for-vagueness doctrine, this Court should invalidate Section 13.21 of the Texas Family Code as void-for-vagueness.[14]

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13 (continued)

"standard provides little real guidance to the judge...[whose] decision must necessarily reflect personal and societal values and mores whose enforcement is fundamentally at odds with privacy interests.") (Stevens, Brennan, Marshall and Blackman, JJ. concurring). See also, Santosky v. Kramer, supra at 612 (vague standards leave trial judges "unusual discretion to underweigh probative facts that might favor the parent").

[14] It is unnecessary in this case to consider whether the best interest standard would remain an appropriate basis for resolving custody disputes between biological parents or for less drastic intrusions into the parent-child relationship such as temporary removal. This case poses the narrow issue of whether a best interest standard may govern a termination proceding aimed at a parent anxious to assume his parental responsibilities.

II. THE IMPOSITION OF A BEST INTEREST STANDARD ON PETITIONER EFFECTS A DUAL DISCRIMINATION ON GROUNDS OF SEX AND ILLEGITIMACY IN CONFLICT WITH THIS COURT'S REASONING IN CABAN v. MOHAMMED AND GOMEZ v. PEREZ.

A. The Texas Statutory Scheme Incorporates An Impermissible Gender Bias.

The Texas Supreme Court's refusal to grant a writ of error in the instant case stands in conflict with this Court's reasoning in Caban v. Mohammed 441 U.S. 380 (1979), which invalidated a New York statute permitting an unwed mother, but not an unwed father, to bar the adoption of their illegitimate child. In Caban, as here, the identity of the father in question was known, and he had manifested signficant parental interest in the child. 441 U.S. at 394. The Court in Caban gave great deference to the important governmental interest in providing for the well being

of illegitimate children but held that the "unquestioned right of the State to further these desirable ends . . . is not in itself sufficient to justify the gender based distinction. . . ." 441 U.S. at 391. The statute at issue here is almost identical to the one invalidated in Caban:[15] both prevent a fit unwed father from retaining his parental rights to his child unless he can persuade a court that, under the vague "best interests of the child" standard, the child's adoption is not appropriate.

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[15] The Texas Supreme Court has held that Texas, unlike New York, permits an unwed father to seek to legitimate his child without the mother's consent. If successful, the father then has the right to block an adoption. In Interest of T.E.T., 602 S.W.2d 793, cert. den. sub. nom., Oldag v. Catholic Charities, 450 U.S. 1025 (1981)(Brennan, Marshall, and White, JJ. dissenting from the denial of certiorari). That court overlooked, however, that under Texas law the legitimation petition will not be granted over the mother's objection without a finding that it is in the

In order to survive, a gender based distinction must be closely and substantially related to the achievement of an important governmental objective. Craig v. Boren, 429 U.S. 190 (1976). The proponent of a facial gender distinction must bear the burden of showing an "exceedingly persuasive justification for the classification." Mississippi University of Women v. Hogan, 73 L.Ed.2d 1090, 1098 (1982), quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979).

The Texas statute here challenged, however, is based upon the twin assumptions

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15 (continued)
best interests of the child to do so. Texas Family Code §13.21(c). Thus, under both the New York and the Texas statutory schemes, unwed fathers, but not unwed mothers, can be deprived of parental rights without a showing of unfitness pursuant to an amorphous best interest standard.

that (1) all unwed fathers are "sperm donor[s], rapist[s], hit and run lover[s], adulterer[s], or the like", see T.E.T., 603 S.W.2d at 797, or, at best, unloving and disinterested in their children; and (2) that unwed mothers, by contrast, are nurturing and caring, or at least may be trusted (unlike the fathers) to have the best interests of the child at heart. With these assumptions at its core, this statute is freighted with the "baggage of sexual stereotypes" so often condemned by this Court. Orr v. Orr, 440 U.S. 268, 283 (1979); Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975); Stanton v. Stanton 421 U.S. 7, 14 (1975). The harm done to caring fathers such as petitioner is patent. Less obvious but equally invidious is the harm done to women by the perpetuation of such

stereotypes. As a result, women are inevitably locked into the childcare role, unable to share childrearing responsibilities equally with men.

The rationale offered by the court below is that the statute distinguishes between fathers who have accepted the legal and moral commitment of the family and fathers who do not. In the Interest of T.E.T., supra 603 S.W.2d at 797. But utilizing a sex-based classification that excludes all unwed fathers of infants, including those such as petitioner who have eagerly sought parental responsibility for their children, does not rationally serve the stated objectives of fostering such assumption of paternal responsibility and protecting illegitimate children. Instead, the Texas Family Code has the anomalous

effect of granting greater parental rights to a putative father who denied paternity, lacks any interest in his child and was brought into court against his will, than to a putative father such as the petitioner who acknowledged paternity and parental responsibility from the beginning and who voluntarily came forward to legitimate his child.[16]

This case presents the very injustice the majority in Caban sought to preclude:

> The effect of [the State's] classification is to discriminate against unwed fathers even when their

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[16] A father who is the subject of an involuntary legitimation petition will become, under Texas law, a "legal" parent whose rights may not be terminated except upon a showing of unfitness. Fathers like the petitioner who voluntarily seek to legitimate their children are subjected to a far more permissive best interest standard. Such an irrational discrimination cannot withstand any level of judicial scrutiny. Cf. O'Brien v. Skinner, 414 U.S. 524 (1974).

> identity is known and they have manifested significant paternal interest in the child. The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children. [The statute] both excludes some loving fathers from full participation in the decision whether their children will be adopted and at the same time enables some alienated mothers arbitrarily to cut off the paternal rights of fathers. 441 U.S. at 394.

In Caban, as here, such an undifferentiated gender distinction between unwed parents bears no discernible relationship to the state's legitimate interests.

B. The Texas Statutory Scheme Invidiously Discriminates Against Illegitimate Children.

This Court held in Gomez v. Perez, 409 U.S. 535, 538 (1973), that under the Equal Protection Clause of the Fourteenth Amendment, "a State may not invidiously

discriminate against illegitimate children by denying them substantial benefits accorded children generally." In direct conflict with principles expressed in Gomez, the Texas statutory scheme upheld below invidiously discriminates against illegitimate children by denying them the opportunity to enjoy a family relationship with their biological fathers which is afforded legitimate children.

In its legitimation and adoption provisions Texas unlawfully continues, even after Gomez and its progeny,[17] to slight the fundamental rights of illegitimate children to the care and support of their biological fathers. The Texas statutory

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[17] See discussion in Mills v. Habluetzel, ___U.S.___, 71 L.Ed.2d 770, 773-76, (1982).

scheme, so frequently in need of correction by this Court, invidiously discriminates against Baby Girl S. by denying her the relationship with her natural father which she would enjoy if legitimate. In the instant case, because the mother surrendered her parental rights, Baby Girl S. has the companionship of only one biological parent available to her, yet she has been precluded from that relationship solely because she is illegitimate. The nature of Baby Girl S.' opportunity for a relationship with her natural father thus rests completely on her status of birth. By imposing a distinction between an illegitimate child with a willing, loving father and a legitimate child with such a father, the state of Texas imposes "disabilities on the illegitimate child...contrary to the basic concept of our system that burdens

should bear some relationship to individual responsibility or wrong doing." Weber v. Aetna Casualty Surety Co., 406 U.S. 164, 175 (1972).

Distinctions on the basis of legitimacy cannot survive equal protection scrutiny where they are not "substantially related to a legitimate state interest." Mills v. Habluetzel, supra at 778; Lalli v. Lalli, 439 U.S. 259, 265 (1978); Trimble v. Gordon, 430 U.S. 762, 767 (1977); Mathews v. Lucas, 427 U.S. 495, 519 (1976). Because the Texas statutory scheme deprives Baby Girl S. of a source of support and care available to all other children, it effectively undermines the asserted governmental interest, recognized in Caban, of providing for the well being of illegitimate children -- an interest which this court has found frustrated by other discriminatory

provisions in the Texas Family Code. See Mills v. Habluetzel, supra; Gomez v. Perez, supra.[18]

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[18]The State's only substantial interest in this area -- the facilitation of the adoption of illegitimate children who would, otherwise, be without a stable home -- is not present in this case since petitioner is concededly willing and able to assume full parental responsibility for his daughter, including the provision of a home certified as adequate by a social worker commissioned by the Texas court itself.

III. THE TEXAS STATUTORY SCHEME IS FLATLY INCONSISTENT WITH SANTOSKY v. KRAMER BECAUSE IT PLACES THE BURDEN OF PROOF ON THE PARENT WHO IS THE TARGET OF THE TERMINATION PROCEEDING.

In Santosky v. Kramer, ___U.S.___, 71 L.Ed.2d 599 (1982), this Court ruled that the State must prove its case in a termination proceeding by clear and convincing evidence. The Texas statutory scheme places the persuasion burden on an unwed father seeking to block the adoption of his child by requiring him to establish that the best interest of the child would be advanced by granting the father's legitimation petition. As Justice Rehnquist noted in his dissent in Santosky, even if the State were required to prove by clear and convincing evidence that Baby Girl S.' best interest would be served by adoption by strangers rather than legitimation by

her father, the statute would raise serious constitutional issues of substantive due process. ___U.S.___, ___, 71 L.Ed.2d 599, 619 (1982). Where, as here, the State refuses to shoulder its constitutionally mandated burden of proof and, instead, insists upon shifting the persuasion burden to the parent, its action is constitutionally indefensible.

CONCLUSION

For the above-stated reasons, this petition for certiorari should be granted. Petitioner respectfully suggests that summary reversal may be appropriate.

Respectfully submitted,

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No. 5038-C

IN THE INTEREST	:	IN THE 326th DISTRICT COURT OF TAYLOR
OF	:	COUNTY, TEXAS
BABY GIRL SCHULZ, A CHILD	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above captioned cause came on for trial before the Court without a jury on the 28th day of August, 1981. All parties and their attorneys were present. After considering the pleadings, the evidence, and the argument of counsel, the Court, in response to a request from the Respondent Cross-Petitioner, Donald J. Kirkpatrick, makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. The child the subject of this suit is:

NAME: Baby Girl Schulz SEX: Female
BIRTHPLACE: Abilene, Taylor County, Texas BIRTHDATE: January 11, 1981

PERMANENT RESIDENCE: Abilene, Taylor County, Texas

2. The mother of the child the subject of this suit is Rachel Lin Schulz.

3. The child the subject of this suit is not legitimate as to any man.

4. The natural father of the child the subject of this suit is Donald J. Kirkpatrick.

5. The natural mother of the child, Rachel Lin Schulz, has not consented to the voluntary legitimation of the child by the Respondent Cross-Petitioner, Donald J. Kirkpatrick.

6. The managing conservator of the child, Christian Homes of Abilene, Inc., has not consented to the voluntary legitimation of the child by the Respondent Cross-Petitioner, Donald J. Kirkpatrick.

7. It is not in the best interest of the child for this Court to consent to the legitimation of the child by the Respondent Cross-Petitioner Donald J. Kirkpatrick.

8. It is in the best interest of the child that the parent-child relationship between Rachel Lin Schulz and the child be terminated.

9. It is in the best interest of the child to appoint Christian Homes of Abilene, Inc., managing conservator of the child for the purpose of placing the child for adoption.

CONCLUSIONS OF LAW

1. The parent child relationship does not exist between the Respondent Cross-Petitioner, Donald J. Kirkpatrick, and the child the subject of this suit.

2. The child the subject of this suit should not be designated as the legitimate child of the father, Donald J. Kirkpatrick.

3. The father, Donald J. Kirkpatrick, should not be designated a parent of the child.

4. The parental rights of the natural mother Rachel Lin Schulz should be terminated.

5. Christian Homes of Abilene, Inc., should be appointed managing conservator of the child having all the rights, privileges, duties and powers of a managing conservator as set forth in Section 14.02 (b), Texas Family Code, and, specifically, power to consent to the adoption of the child and to make placement of the child for the purpose of adoption.

SIGNED this 24th day of September, 1981.

B. J. Edwards
JUDGE PRESIDING

Judge of the 104th District Court sitting for the 326th District Court.

In Re: Baby Girl S, A Child

No. 11-81-157-CV -- Appeal from Taylor County

Christian Homes of Abilene, Inc., brought suit to terminate the parent-child relationship of an infant girl, B.G.S. The unmarried biological father filed a cross action seeking to legitimate the child and gain her custody. Following trial before the court, judgment was entered that the parent-child relationship between the mother and B.G.S. be terminated; the father's petition to legitimate be denied and all his rights to the child be foreclosed; and Christian Homes be appointed managing conservator of B.G.S. The biological father appeals. We affirm.

In his first point of error the biological father contends that the trial court abused its discretion by denying

the petition for voluntary legitimation.

At the time of the hearing, August 8, 1981, the natural mother was only sixteen and the biological father was twenty-five years old. They had met through the father's sister and had a premarital sexual relationship for at least a year and a half before the child was conceived in April, 1980. After being aware of her pregnancy, the girl considered and discussed her alternatives with her parents and the father and chose to go to a home for unwed mothers operated by Christian Homes. She concluded after additional counseling regarding whether she should keep the child or permit its adoption that it would be in the best interest of the child to relinquish her parental right and allow the child to be adopted. After the birth of B.G.S., the mother executed an Affidavit of Relinquishment of Parental Rights pur-

suant to TEX. FAM. CODE ANN. § 15.03 (Vernon Supp. 1981).

At the hearing the biological father testified: "All I can say is I love my daughter and I want her, and she's blood, and I just can't see letting her go when I want to raise her myself." His plans included returning with her to the same small town where the illicit sexual activity occurred and included the assistance of his mother and sister in the rearing of the child. Although the biological father testified as to his readiness to pay all cost involved in the pregnancy and the delivery and care of the child and her mother, there had never existed a family relationship between himself and the child. The biological father had a form of epilepsy called grand mal which was controlled with medication.

The testimony reflects that the parents of the mother disapproved of the relationship between the mother and the biological father and forbade the consumation of a marriage relationship. It was the mother's desire that the child be adopted and reared in a two-parent Christian family. The mother herself was an adopted child and was aware of the stigma under which an illegitimate child suffers. She testified that in her opinion adoption would serve the best interest of the child. Her parents were supportive of the mother and her decision.

TEX. FAM. CODE ANN. § 13.21 (Vernon Supp. 1981) provides that in a voluntary legitimation suit where the mother or managing conservator fails to give consent to the legitimation by the biological father, the court may consent to the legitimation provided the entering of such a decree is in the best interest of

the child. (Emphasis ours)

As stated by the court in Travis County Child Welfare Unit v. Vance, 566 S.W.2d 112 (Tex.Civ.App. - Austin 1978, no writ): "It is the child's best interest, and not the interest of the biological father, which must be served by legitimation. § 13.21(c)."

The Texas Supreme Court in In the Interest of T. E. T., 603 S.W.2d 793, cert. denied, 450 U.S. 1025 (1980), considering the child's best interests said:

> It is easy to understand her decision here that it would not be in the child's best interest for her to be turned over to the nineteen-year-old father and be reared by him in the small town where the illicit sexual activity occurred. On the other hand, the best interests of the illegitimate child will more likely be served by her adoption into a family who will give her the stability of a normal, two-parent home. Moreover, adoption will remove the stigma under which an illegitimate child suffers.

We have carefully reviewed all the

evidence and find no abuse of discretion by the trial judge in denying the petition for voluntary legitimation. In the Interest of C.D.V., 589 S.W.2d 543 (Tex. Civ.App. - Amarillo 1979, no writ).

The first point of error is overruled.

In his second point of error, the biological father urges:

> Section 13.21, Voluntary Legitimation, Family Code, V.A.T.S., is unconstitutional in that it violates the equal protection and due process clause of the fourteenth amendment to the United States Constitution.

This contention has been overruled by the Texas Supreme Court in In the Interest of T. E. T., supra. There the court said:

> The narrow issue before us is whether the gender-based distinction of the Texas statutory scheme for establishing status as a parent is substantially related to the important state objective of promoting the best interest of children born out of wedlock and is substantially related to the achievement of this objective. We

hold that it is so related.

* * *

> The biological father was given timely notice of the proceedings to terminate the mother's parental rights and, in response, brought suit as permitted under the Texas Family Code to legitimate the child. He thus had the procedural due process required by Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

The second point of error is overruled.

Next, appellant argues that the court erred in overruling his motion for amended or more specific findings of fact and conclusions of law.

The court in City of Fort Worth v. Bewley, 612 S.W.2d 257 (Tex.Civ.App. Eastland 1981, writ ref'd n.r.e.), considering such a point of error, said:

> Additional findings are not required where the requests do not relate to ultimate or controlling issues, or where they conflict with the original findings of fact which were made and filed by the trial judge. State v. Wiergate Lumber Company, Inc.,

582 S.W.2d 258 (Tex.Civ. App. - Beaumont 1979, writ ref'd n.r.e.).

In the case at bar, the additional findings and conclusions either conflict with the original findings and conclusions, or do not relate to the ultimate or controlling issue in controversy. The point of error is overruled.

Finally, in a supplemental brief the biological father contends that:

> Section 13.2., Voluntary Legitimation, Family Code, V.A.T.S., is unconstitutional in that it violates Texas Constitutional Article 1, Section 3-A, the Texas equal rights amendment.
>
> The amendment states:
>
> Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin. This Amendment is self-operative.

The court in Mercer v. Board of Trustees, North Forest Independent School District, 538 S.W.2d 201 (Tex.Civ.App. - Houston [14th Dist.] 1976, writ ref'd

n.r.e.), considered whether a regulation regarding school hair length violated the Texas Equal Rights Amendment. After thorough consideration and comparison of similar enactments by other jurisdictions as well as federal court decisions the court said:

> We cannot agree with the Supreme Court of Washington that the ERA admits of no exceptions to its prohibition of sex discrimination. Any classification based upon sex is a suspect classification, and any law or regulation that classifies persons for different treatment on the basis of their sex is subject to strictest judicial scrutiny. Any such classification must fall unless the party defending it can show that it is required by (1) physical characteristics, (2) other constitutionally protected rights such as the right of privacy, or (3) other "compelling reasons." With respect to "physical characterstics" we are simply recognizing the facts of life. For us to adjudicate that women are men would be as futile as it would be absurd. Neither the ERA nor the rights established by it require us to construe it so as to deny sexual or reproductive differences between the sexes. Nor does the ERA require that such rights so established (and so long

> denied) be enforced where they come into conflict with other basic fundamental constitutionally-protected rights such as that of privacy. To justify a suspect classification by "compelling reasons" places the burden of proof and persuasion on the party defending the classification.

We hold that TEX. FAM. CODE ANN. § 13.21 (Vernon Supp. 1981) meets the "other compelling reasons" test as set forth in Mercer and, therefore, does not violate the Texas Equal Rights Amendment. The compelling reason is the important state objective in promoting the best interest of children born out of wedlock.

As stated by the court in In the Interest of T. E. T., supra:

> (T)he State has a legitimate interest in protecting the children who are born as a result of premarital sexual activity. The mother, by virtue of her pregnancy, is automatically responsible for the child. She has the physical burdens and responsibilities of the pregnancy. She can choose to abort the child or

she may carry it full term. The State has a substantial interest in encouraging the unwed mother to properly care for the child by assuring her that her wishes as to the disposition of the child will not, absent her consent or a finding of the child's best interest, be subject to the absolute veto of the biological father. This statute is substantially related to the achievement of that interest.

On the other hand, the biological father is not automatically responsible for the child. He may not have an interest in legitimating the child. He may not promptly disclose his interest in the child. In most situations, he can wait until after the child is born before committing himself. While the mother who is unmarried and pregnant is trying to figure out what she will do with the child, the father is totally free from any responsibility with respect to the child. To classify him as a parent simply because he is the biological father would give him a powerful club with which he could substantially reduce the options available to the unmarried mother. All must agree that an unmarried fourteen-year-old high school freshman has a serious problem when she discovers she is pregnant and she needs all the options that the State can properly make available to her.

The court in In the Interest of K., 535 S.W.2d 168, cert. denied, 429 U.S. 907 (1976) said:

> There is a rational basis for the state, which has an interest in securing stable homes and supportive families for children, to distinguish between the father who has accepted the legal and moral commitment to the family and the father who has not done so....Texas law offers the biological father of an illegitimate child the opportunity to prove...that he should not be treated differently from fathers legally committed to the mothers of their children....Thus S.D.A. sought and received a fair hearing....the denial of his petition for parental status was shown to be in the best interest of the child. His rights have been respected. The rights of society and baby girl K permit him nothing more.

The point of error is overruled.

Our holding on the points of error presented by appellant make it unnecessary to consider appellee's cross-point contending that appellant did not comply with the requirements of TEX. FAM. CODE ANN. § 13.21 (Vernon Supp. 1981).

The judgment is affirmed.

/s/

RALEIGH BROWN

ASSOCIATE JUSTICE

February 11, 1982

JUDGMENT

In Re: Baby Girl S., a child	X	From the 326th
No. 11-81-157-CV	X	District Court of Taylor County.
		February 11, 1982
		Opinion by Brown, A. J.

This cause came on to be heard on the record and the same being inspected, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court be, and the same is hereby, in all things affirmed, in accordance with this Court's opinion. It is further ordered that the costs incurred by reason of this appeal be, and the same are hereby, taxed against appellant, Donald Kirkpatrick, principal, and Sam Moore and Jess Holloway, sureties on his appeal bond, for which let execution

issue, and that this decision be certified below for observance.

CLERK'S OFFICE - SUPREME COURT

Austin, Texas

June 16, 1982

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of IN RE: BABY GIRL S, No. C-1190 was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON,

Clerk

THE SUPREME COURT OF TEXAS

P.O. Box 12248 Capitol Station

Austin, Texas 78711

July 14, 1982.

Mr. Sam Moore, Attorney
P. O. Box 3819
Abilene, Texas 79604

Mr. Charles E. Meyers, Attorney
104 Citizens Bank Building
Abilene, Texas 79601

Dear Sirs:

The motion for rehearing in the case of IN RE: BABY GIRL S., C-1190, was this day overruled.

Very truly yours,

/s/

Garson R. Jackson,
Clerk

Office-Supreme Court, U.S.
FILED
FEB 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DONALD J. KIRKPATRICK,

Petitioner,

—v.—

CHRISTIAN HOMES OF ABILENE, INC., and the 326th DISTRICT COURT OF TAYLOR COUNTY, TEXAS,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

JOINT APPENDIX

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Petition for Certiorari filed October 12, 1982
Certiorari Granted January 17, 1983

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Notes: In the interest of preserving the privacy of third parties, throughout this appendix, the natural mother and her family are referred to only by their initials. The child is referred to as "Baby Girl S." The family's address has also been deleted from the record.

The Attorney General of Texas has been consulted in connection with the preparation of this Appendix and has no objection to its contents.

RELEVANT DOCKET ENTRIES

Cause No. 5038-C

1.	Original Petition to Terminate Parent-Child Relationship	Jan. 15, 1981
2.	Mother's Affidavit of Relinquishment of Parental Rights to Licensed Child-Placing Agency	Jan. 16, 1981
3.	Affidavit of Status	Jan. 16, 1981
4.	First Amended Original Petition to Terminate Parent-Child Relationship	Jan. 16, 1981
5.	Statement of Paternity	Feb. 3, 1981
6.	Respondent's Original Answer	Feb. 3, 1981
7.	Original Petition for Voluntary Legitimation of a Child	Feb. 3, 1981

8.	Motion for Appointment of Temporary Managing Conservator	Feb. 5, 1981
9.	Cross Respondent's Original Answer	Feb. 23, 1981
10.	Managing Conservator's Refusal to Consent to Voluntary Legitimation by Natural Father	March 2, 1981
11.	Natural Mother's Refusal to Consent to Voluntary Legitimation by Natural Father	March 9, 1981
12.	Statement of Paternity (Second One Filed)	March 11, 1981
13.	Order for a Social Study	Apr. 1, 1981
14.	Social Study	June 16, 1981
15.	First Amended Original Petition for Legitimation of a Child	Aug. 21, 1981

16. Appointment of Guardian Ad Litem for R L S — Aug. 25, 1981

17. Appointment of Guardian Ad Litem for Baby Girl S — Aug. 25, 1981

18. Decree of Termination and Order Denying Voluntary Legitimation — Sept. 3, 1981

19. Motion and Order for Sealing File — Sept. 8, 1981

20. Notice of Filing Request for Findings of Fact and Conclusions of Law — Sept. 9, 1981

21. Request for Findings of Fact and Conclusions of Law — Sept. 10, 1981

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24.	Notice of Appeal	Oct. 1, 1981
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NO. 5038-C

IN THE INTEREST	X	IN THE 326TH
OF BABY GIRL	X	DISTRICT COURT
S	X	IN TAYLOR COUNTY,
A CHILD	X	TEXAS

ORIGINAL PETITION TO TERMINATE PARENT-CHILD RELATIONSHIP

This suit is brought by Christian Homes of Abilene, Inc. whose residence is 242 Beech Street, Abilene, Texas. Petitioner is an agency authorized by the State Department of Human Resources of Texas to place children for adoption.

No court has continuing jurisdiction of this suit nor of the child who is the subject of this suit.

The following child is the subject of this suit:

NAME: Baby Girl S
SEX: Female
BIRTHPLACE: Abilene, Taylor County, Texas
BIRTH DATE: January 11, 1981
PRESENT RESIDENCE: Abilene, Taylor County, Texas

The mother of the child is R L S , whose age is 16, whose birthdate is October 1, 1964, and whose residence is

.

No service is necessary at this time.

The child is not legitimate as to any man. An affidavit of status, executed by the mother is attached hereto. Based on the affidavit of status executed by the mother, petitioner alleges that the father of the child is Donald J. Kirkpatrick, whose birthdate

is April 8, 1956, and whose address is RR #1, York, Nebraska 68467. Serve him at this address. The child is not the legitimate child of the father in that the child was not born or conceived before or during a marriage of the mother and father or not born or conceived before or during an attempted marriage of the mother and father in apparent compliance with the laws of this state or another state or nation.

The father has a right to legitimate the child by filing a statement of paternity with the State Department of Human Resources and petitioning the Court for legitimation, as provided in Sec. 13.01 (b), Texas Family Code, provided, however, the Court consents

to the father's attempt to legitimate the child. If the father files this statement of paternity and secures the Court's consent to legitimate the child, he shall have the rights and duties of a parent, but if he neglects or refuses to do so, he shall have no rights in and to the child.

The guardian of the estate of the child is: NONE.

No property is owned or possessed by the child.

Termination of the parent-child relationship between R L S , the natural mother, and the child is in the best interest of the child and such termination is requested. As further grounds for termination, Petitioner alleges that this parent will execute

after this suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided in Sec. 15.03, Texas Family Code. This affidavit of relinquishment is attached to the petition or will be filed herein.

Termination of the parent-child relationship between Donald J. Kirkpatrick, the natural father, and the child is in the best interest of the child and such termination is requested.

The parent-child relationship between the child and the natural father does not exist in law nor in fact. It is in the best interest of the child that all rights, privileges, duties, and powers, if any there be, of the natural father with respect to the

child, be terminated and such termination is requested.

As grounds for termination of these rights Petitioner alleges that this parent has voluntarily and with knowledge of the pregnancy abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care during the period of abandonment before the birth of the child and remained apart from the child or failed to support the child since the birth, Section 15.02 (H).

Christian Homes of Abilene, Inc., has been or will be designated Managing Conservator in an affidavit of re-

linquishment executed by the mother and such appointment is in the best interest of the child.

Petitioner requests the court to appoint a guardian ad litem to represent the interest of the child.

PRAYER

Petitioner prays that citation be issued to all persons entitled to citation under the law.

Petitioner prays that the Court enter judgment in accordance with the requests and allegations above.

Petitioner prays for general relief.

/s/ Charles E. Meyers
Attorney for
Petitioners
Suite 104, Citizens
Natl. Bank
Abilene, Texas

CAUSE NO. 5038-C

IN THE INTEREST OF	X	IN THE 326TH
BABY GIRL S		DISTRICT COURT IN
	X	
A CHILD		TAYLOR COUNTY,
	X	TEXAS

MOTHER'S AFFIDAVIT OF RELINQUISHMENT OF PARENTAL RIGHTS TO LICENSED CHILD-PLACING AGENCY

STATE OF TEXAS

COUNTY OF TAYLOR

Before me, the undersigned authority, on this day personally appeared R L S , who, being by me duly sworn, in the presence of the undersigned credible witnesses upon oath stated:

"My name is R L S . My age is 16 years. My address is .

I am the mother of a child whose name

is Baby Girl S and whose birthdate is January 11, 1981.

"I am not presently obligated by Court order to make payments for the support of the child.

"A full description and statement of value of all property owned or possessed by the child is as follows: NONE.

"The child is not the legitimate child of the father and I have executed an Affidavit of Status of Child. The natural father of the child is Donald J. Kirkpatrick and his address is RR #1, York, Nebraska 68467.

"It is in the best interest of my child that the child be placed for adoption in a suitable home by an agency licensed by the Texas Department of

Human Resources to place children for adoption. I therefore designate Christian Homes of Abilene, Inc., as Managing Conservator of the child. I have been informed of my parental rights, powers, duties, and privileges. I consent to the placement of the child for adoption by this agency.

"I fully understand that a lawsuit has been filed in the 326th District Court of Taylor County, Texas, to terminate forever the parent-child relationship between me and my child is in the best interest of the child. I understand that by executing this affidavit, I make this termination possible. With this in mind, I hereby

declare that this Affidavit of Relinquishment of Parental Rights is and shall be final, permanent, and irrevocable. I FULLY UNDERSTAND THAT IF I CHANGE MY MIND AT ANY TIME, I CAN NEVER FORCE THE AGENCY TO DESTROY, REVOKE, OR RETURN THIS AFFIDAVIT AND THAT I CANNOT TAKE BACK OR UNDO THIS AFFIDAVIT IN ANY WAY.

"It is in the best interest of my child that this by my last parental act and deed. Not wishing to appear or be cited in the termination suit, filed under Cause No. 5038-C, Taylor County, Texas, 326th District Court, and having received a copy of the Original Petition to terminate my rights, I hereby waive the right to issuance, service, and

return of all process in the suit to terminate the parent-child relationship between the child and me without further notice to me. I FULLY UNDERSTAND THAT I WILL NOT BE INFORMED FURTHER ABOUT THIS SUIT."

/s/ R L S
Affiant

WITNESS:

/s/ Judy Roysden
607 Avondale
Merkel, TX

/s/ Brenda Martin
1326 Briarwood
Abilene, TX

Subscribed and sworn to before me by said affiant in the presence of the foregoing credible witnesses on this day, to certify witness my hand and

and seal of office this 16th day of January, 1981, at 9:35 o'clock.

/s/ Peggy McDermed
Notary Public, In and
For Taylor County,
Texas

My commission expires
9/2/81.

CAUSE NO. 5038-C

IN THE INTEREST OF X IN THE 326TH DIS-
BABY GIRL S X TRICT COURT IN
A CHILD X TAYLOR COUNTY,
TEXAS

AFFIDAVIT OF STATUS

STATE OF TEXAS

COUNTY OF TAYLOR

Before me, the undersigned authority, on this day personally appeared R L S , who, being by me duly sworn, in the presence of the undersigned credible witnesses upon oath stated:

"I am the mother of Baby Girl S , a female child born to me on January 11, 1981, in Taylor County, Texas.

"I am not and have never been married to the father of the child, and we never attempted to marry each other under the laws of any state or nation. Paternity

of the child has not been established under the laws of any state or nation.

"The name of the father is Donald J. Kirkpatrick, and his address is RR #1, York, Nebraska 68467.

/s/ R L S , Affiant

WITNESSES:

/s/ Judy Roysden
Signature

607 Avondale Merkel, Tx
Address

/s/ Brenda Martin
Signature

1526 Briarwood, Abilene, Tx
Address

Subscribed and sworn to before me by said affiant in the presence of the foregoing credible witnesses on this day, to certify which witness my hand and seal of office this 16th day of January, 1981, at 9:35 a.m. o'clock.

/s/ Peggy McDonald
Notary Public, In and For
Taylor County, Texas

My commission expires
9/2/81.

CAUSE NO. 5038-C

IN THE INTEREST OF	X	IN THE 326th DIS-
BABY GIRL S	X	TRICT COURT IN TAY-
A CHILD	X	LOR COUNTY, TEXAS

FIRST AMENDED ORIGINAL PETITION
TO TERMINATE PARENT-CHILD RELATIONSHIP

This suit is brought by Christian Homes of Abilene, Inc. whose residence is 242 Beech Street, Abilene, Texas. Petitioner is an agency authorized by the Texas Department of Human Resources to place children for adoption.

No court has continuing jurisdiction of this suit nor of the child who is the subject of this suit.

The following child is the subject of this suit:

NAME: Baby Girl S
BIRTHPLACE: Abilene, Taylor County, Texas
BIRTH DATE: January 11, 1981
PRESENT RESIDENCE: Abilene, Taylor County, Texas
SEX: Female

The mother of the child is R L S , whose age is 16, and whose residence is

.

No service is necessary at this time.

The child is not legitimate as to any man. An Affidavit of Status, executed by the mother is attached hereto.

Based on the Affidavit of Status executed by the mother, petitioner alleges that the father of the child is Donald J. Kirkpatrick, who resides at RR #1, York, Nebraska 68467. No service is necessary at this time.

The child is not the legitimate child of the father in that the child was not born or conceived before or during a marriage of the mother and father or not born or conceived before or during an attempted marriage of the mother and father in apparent compliance with the laws of this

state or another state or nation.

The father has a right to legitimate the child by filing a statement of paternity with the Texas Department of Human Resources and petitioning the court for legitimation, as provided in Sec. 13.01 (b), Texas Family Code, provided, however, the Court consents to the father's attempt to legitimate the child. If the father files this statement of paternity and secures the Court's consent to legitimate the child, he shall have the rights and duties of a parent, but if he neglects or refuses to do so, he shall have no rights in and to the child.

The guardian of the estate of the child is: NONE.

No property is owned or possessed by the child.

Termination of the parent-child relationship between R L S , the

natural mother, and the child is in the best interest of the child and such termination is requested. As further grounds for termination, Petitioner alleges that this parent will execute after this suit is filed an unrevoked or irrevocable Affidavit or Relinquishment of Parental Rights as provided in Sec. 15.03, Texas Family Code. This Affidavit of Relinquishment is attached to the petition or will be filed herein.

Termination of the parent-child relationship between Donald J. Kirkpatrick, the natural father, and the child is in the best interest of the child and such termination is requested.

The parent-child relationship between the child and the natural father does not exist in law or in fact. It is in the best interest of the child that all rights, privileges, duties, and powers, if any

there be, of the natural father with respect to the child, be terminated and such termination is requested.

As grounds for termination of these rights Petitioner alleges that this parent voluntarily and with knowledge of the pregnancy abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care during the period of abandonment before the birth of the child and remained apart from the child or failed to support the child since the birth. As further grounds for termination Petitioner alleges that the natural father has executed after this suit is filed an unrevoked or irrevocable Affidavit of Relinquishment of Parental Rights as provided in Sec. 15.03, Texas Family Code. This Affidavit of Relinquishment is attached to the petition

or will be filed herein.

Christian Homes of Abilene, Inc., has been or will be designated Managing Conservator in an Affidavit of Relinquishment executed by the mother and such appointment is in the best interest of the child.

Petitioner requests the Court to appoint a guardian ad litem to represent the interest of the child.

PRAYER

Petitioner prays that citation be issued to all persons entitled to citation under the law.

Petitioner prays that the Court enter judgment in accordance with the requests and allegations above.

Petitioner prays for general relief.

/s/ Charles E. Meyers
Attorney for Petitioner
Suite 104, Citizens National
Bank Building
Abilene, Texas 79601

No. 5038-C

IN THE INTEREST OF	X	IN THE DISTRICT
BABY GIRL S	X	COURT OF TAYLOR
A CHILD	X	COUNTY, TEXAS
		326TH JUDICIAL
		DISTRICT

STATEMENT OF PATERNITY

I, DONALD J. KIRKPATRICK, make the following statements on my oath;

"I was born April 8th, 1956, and am a resident of Route 1, York, Nebraska 68467. I acknowledge that I am the father of Baby Girl S , a female child, born to R L S in Taylor County, Texas, on the 11th day of January, 1981.

"I have never been legally married

to the mother of this child nor have she and I ever attempted to marry under the laws of any state or nation. To the best of my information and belief, the child is not the legitimate child of any other man and is therefore entitled to my financial support."

/s/ DONALD J. KIRKPATRICK

/s/ Deverne J. Noyd Witness

/s/ Mark A. Werner Witness

THE STATE OF NEBRASKA *
*
COUNTY OF YORK *

SUBSCRIBED and SWORN TO before me by the said DONALD J. KIRKPATRICK Affiant, and Deverne J. Noyd and Mark A. Werner, Witnesses, on this the 29th

day of January, 1981.

/s/ Lyle L. Murphy
Notary Public and for
York County, Nebraska.

NO. 5038-C

IN THE INTEREST OF	*	IN THE DISTRICT
	*	
BABY GIRL S	*	COURT OF TAYLOR
	*	
A CHILD	*	COUNTY, TEXAS
		326TH JUDICIAL
		DISTRICT

RESPONDENT'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Respondent, DONALD J. KIRKPATRICK, and files this his Original Answer to the First Amended Original Petition to Terminate Parent-Child Relationship filed in the above-entitled and numbered cause by Petitioner, CHRISTIAN HOMES OF ABILENE, Inc., and would respectfully show unto the Court the following:

I.

Respondent denies each and every, all and singular, the allegations in Petitioner's suit to Terminate Parent-Child Relationship.

PRAYER

WHEREFORE, Premises Considered, Respondent prays that all relief prayed for by Petitioner be denied.

Respondent prays for general relief.

Respectfully submitted,

ROBINSON, HANNA, MOORE
& HOLLOWAY, INC.
P.O. BOX 3819, Abilene,
TX 79604
(915) 673-3792

By: /s/ SAM MOORE
Bar Number 14376000

ATTORNEYS FOR RESPONDENT,
DONALD J. KIRKPATRICK

NO. 5038-C

IN THE INTEREST OF	*	IN THE DISTRICT
BABY GIRL S	*	COURT OF TAYLOR
A CHILD	*	COUNTY, TEXAS
		326TH JUDICIAL
		DISTRICT

ORIGINAL PETITION FOR VOLUNTARY LEGITIMATION OF A CHILD

This suit is brought by DONALD J. KIRKPATRICK, Cross-Petitioner, who was born April 8, 1956, and resides at Route 1, York, Nebraska 68467. Cross-petitioner is the father of a child born out of wedlock.

The Court has continuing jurisdiction of this suit.

The following child is the subject of this suit:

NAME: Baby Girl S SEX: Female
BIRTHPLACE: Abilene, Taylor County, Texas
BIRTHDATE: January, 11, 1981
PRESENT RESIDENCE: Abilene, Taylor County, Texas

The mother of the child is R S , who is 16 years of age, and who resides at

Process should be served at that address.

Petitioner/Cross-Respondent, CHRISTIAN HOMES OF ABILENE, INC., should be served at 242 Beech Street, Abilene, Taylor County, Texas.

There are no court-ordered conservatorships, guardianships or other court-ordered relationships affecting the child in this suit.

There is no guardian of the person of the child. There is no guardian of the estate of the child.

No property is owned or possessed by the child.

Cross-Petitioner has executed an affidavit which is attached to and incorporated in this Petition for all purposes stating that he is the father of the child.

Cross-Petitioner has given notice to the mother of the child of this proceeding, as required by Sec. 13.01(a), Texas Family Code.

Cross-Petitioner requests the Court enter a consent to legitimation of the child. Cross-Petitioner requests the Court enter a decree declaring the

child to be the legitimate child of DONALD J. KIRKPATRICK, as authorized by Sec. 13.01, Texas Family Code.

Cross-Petitioner alleges that the best interest of the child would be served by the appointment of Cross-Petitioner as Managing Conservator of the child. Cross-Petitioner asks to be appointed Managing Conservator, as authorized by Sec. 14.01(a), Texas Family Code.

PRAYER

Cross-Petitioner prays that citation be issues to all persons entitled to citation under the law.

Cross-Petitioner prays that the Court enter judgment in accordance with the allegations above.

Petitioner prays for general relief.

Respectfully submitted,

ROBINSON, HANNA, MOORE &
HOLLOWAY, INC.
P.O. Box 3819
Abilene, TX 79604
(915) 673-3792

BY: /s/SAM MOORE
Bar Number 14376000

ATTORNEYS FOR CROSS-
PETITIONER,
DONALD J. KIRKPATRICK

THE STATE OF NEBRASKA *
*
COUNTY OF YORK *

The undersigned states under oath that "I am the Cross-Petitioner in the foregoing Petition for Voluntary Legitimation of a Child and that the fact and allegations stated in it are to the best of my information and belief true and correct."

/s/ DONALD J. KIRKPATRICK

SUBSCRIBED and SWORN TO before me by the said DONALD J. KIRKPATRICK on this 29 day of January, 1981.

/s/ LYLE L. MURPHY
Notary Public in and for
York County, Nebraska

CAUSE NO. 5038-C

IN THE INTEREST OF	*	IN THE 326TH
	*	
BABY GIRL S	*	JUDICIAL DISTRICT
	*	
A CHILD	*	COURT OF TAYLOR
	*	
	*	COUNTY, TEXAS
	*	

CROSS-RESPONDENT'S ORIGINAL ANSWER

Comes now Cross-Respondent, Christian Homes of Abilene, and in answer to Cross-Petitioner's Petition for Voluntary Legitimation of A Child, would respectfully show unto this Honorable Court as follows:

I.

Cross-Respondent admits that Cross-Petition is the father of the child born out of wedlock, to-wit:

NAME: Baby Girl S

BIRTHPLACE: Abilene, Taylor County, Texas
BIRTHDATE: January 11, 1981
PRESENT RESIDENCE: Abilene, Taylor County, Texas
SEX: Female

II.

Cross-Respondent admits that this Court has continuing jurisdiction of this suit and that there are not Court-ordered conservatorships, guardianships or other Court-ordered relationships affecting the child in this suit. Furthermore, there is no guardian of the person of the child, there is no guardian of the estate of the child and no property is owned or possessed by the child.

III.

Cross-Respondent admits that the mother of the above-specified child

is R L S , who is 16 years of age and who resides at

IV.

R L S , the natural mother of said child, refuses to consent to voluntary legitimation of said child by Cross-Petitioner.

V.

Christian Homes of Abilene, Inc., named Managing Conservator by R L S , of Baby Girl S , under Section 15.03(c)(1), Texas Family Code, does hereby refuse to consent to the voluntary legitimation of said child by Cross-Petitioner.

VI.

Cross-Respondent affirmatively states that it is not in the best interest of the above-specified child for this Court to consent to the legitimation of the child nor for this Court to appoint Cross-Petitioner Managing Conservator of the child.

VII.

As to the remaining allegations in Cross-Petitioner's Original Petition for Voluntary Legitimation Of A Child, Cross-Respondent has insufficient knowledge or information as to whether they are true or not and Cross-Respondent therefore denies such allegations.

VIII.

Cross-Respondent, Christian Homes of Abilene respectfully requests this Honorable Court to order the preparation of a Social Study into the circumstances and conditions of the child, the subject of this suit, as well as into the circumstances and conditions of the home of Cross-Petitioner, Donald J. Kirkpatrick, and the facilities of Cross-Respondent, Christian Homes of Abilene.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Cross-Respondent prays that this Court order the preparation of a Social Study into the circumstances and condition of the child, the subject of this suit,

as well as the circumstances and condition of the home of Cross-Petitioner, Donald J. Kirkpatrick, and the facilities of Cross-Respondent, Christian Homes of Abilene, and that upon final hearing herein this Court enter its Order:

(1) Denying each and every, all and singular, the relief sought by Cross-Petitioner, Donald J. Kirkpatrick;

(2) Terminating the parent-child relationship between Cross-Petitioner, Donald J. Kirkpatrick, and the child, the subject of this suit;

(3) Terminating the parent-child relationship between R L S , the natural mother, and the child, the

subject of this suit;

(4) Appointing Cross-Respondent, Christian Homes of Abilene, Temporary Managing Conservator of the child, the subject of this suit; and

(5) Granting such other and further relief as may be just and equitable.

Respectfully submitted,

RHODES, DOSCHER & HEATHERLY
104 Citizens Bank Building
Abilene, TX 79601
(915) 677-2493

By: /s/ Charles E. Meyers
State Bar No. 14759000

ATTORNEY FOR CROSS-RESPONDENT

NO. 5,038-C

IN THE INTEREST OF * IN THE 326TH JUDICIAL

BABY GIRL S * DISTRICT COURT OF

A CHILD * TAYLOR COUNTY, TEXAS

MANAGING CONSERVATOR'S REFUSAL TO CONSENT TO VOLUNTARY LEGITIMATION BY NATURAL FATHER

Come now, Christian Homes of Abilene, Inc., a licensed child placing agency, licensed under the laws of the State of Texas, and licensed by the Department of Public Welfare for Maternity Service and Adoptive Placement as well as other child care services, and upon oath, disposed and says in and through Nancy Miller, Director of Christian Homes of Abilene, Inc:

(1) R L S is the natural mother of Baby Girl S which child is more fully described in our Original Petition to Terminate the Parent-Child Relationship and all other rights, of any kind and nature between Baby Girl S and

R L S and Donald J. Kirkpatrick.

(2) I am aware of the efforts by Donald J. Kirkpatrick to voluntarily legitimate Baby Girl S under Section 13.21(a), Texas Family Code.

(3) Christian Homes of Abilene, Inc., named Managing Conservator by R L S in her Affidavit of Relinquishment of Parental Rights by Mother filed with this Court and executed by the mother on the 16th day of January, 1981, does hereby declare to this Court its refusal to consent to the voluntary legitimation of said child by the natural father, Donald J. Kirkpatrick.

(4) The refusal to consent to

voluntary legitimation of said child by Christian Homes of Abilene, Inc., is the voluntary and free declaration of Christian Homes of Abilene, Inc., and is intended to be effective for Sections 13.21(a), 13.21(b) and 13.21 (c), Texas Family Code.

WITNESSES:

/s/ Von French

/s/ Louise J. Burnett

Christian Homes of Abilene, Inc.
By: /s/ Nancy L. Miller

THE STATE OF TEXAS *

COUNTY OF TAYLOR *

BEFORE ME, the undersigned Notary Public, on this 2nd day of March, 1981, personally appeared Nancy Miller, the Affiant, and Von French and Louise J. Burnett, Witnesses, persons known to me, who subscribed to the above instrument.

The Affiant stated to me on oath that she signed the above instrument freely and voluntarily for the purposes stated in the instrument, and with full understanding of the meaning of the instrument and that she does not wish to revoke it.

/s/ Carol Huckabee
Notary Public in and for
The State of Texas

NO. 5038-C

IN THE INTEREST OF	*	IN THE 326TH
BABY GIRL S	*	JUDICIAL DISTRICT COURT,
A CHILD	*	TAYLOR COUNTY,
	*	TEXAS

NATURAL MOTHER'S REFUSAL TO CONSENT TO VOLUNTARY LEGITIMATION BY NATURAL FATHER

Comes now R L S , natural mother of Baby Girl S , Respondent in the above captioned and numbered cause, and after being placed under oath, disposes and says:

(1) I am the natural mother of Baby Girl S , more fully described in the Original Petition for Termination of Parent-Child Relationship filed in this cause by Christian Homes of Abilene, Inc.

(2) Donald J. Kirkpatrick is the natural father of the child.

(3) I was not married to Donald J. Kirkpatrick either at conception or at the birth of the child.

Nor have we ever attempted to marry under the laws of any state, nor are we married at the present time.

(4) I hereby exercise my statutory rights under Section 13.21(b)(3), Texas Family Code, to refuse my consent to the natural father's attempt to voluntarily legitimate the child who is made the subject of this suit.

(5) I hereby declare, again, as my free and voluntary decision, that Christian Homes of Abilene, Inc., be named Managing Conservator of the child

by this Court and that all rights of all parties be terminated to said child so that said child can be placed by Christian Homes of Abilene, Inc., for adoption.

I make this free and voluntary declaration of my refusal to consent to voluntary legitimation of Baby Girl S by Donald J. Kirkpatrick with the intention that said refusal to consent to the voluntary legitimation is applicable and is exercised under Sections 13.21(a), Section 13.21(b) and Section 13.21(c), Texas Family Code.

WITNESSES:

/s/ Linda Smith

/s/ Gail Walkington

/s/ R I S

KNOW ALL MEN BY THESE PRESENTS

BEFORE ME, the undersigned Notary Public, on this 6th day of March, 1981, personally appeared R L S , the Affiant, and Linda S. Smith and Gail Walkington, Witnesses, persons known to me, who subscribed to the above instrument.

The Affiant stated to me on oath that she signed the above instrument freely and voluntarily for the purposes stated in the instrument, and with full understanding of the meaning of the instrument and that she does not wish to revoke it.

/s/ Joseph J. Essay
Notary Public in and
for Lancaster County,
State of Nebraska

NO. 5038-C

IN THE INTEREST OF	*	IN THE DISTRICT
BABY GIRL S	*	COURT OF TAYLOR
A CHILD	*	COUNTY, TEXAS
	*	326TH JUDICIAL
	*	DISTRICT

STATEMENT OF PATERNITY

I, DONALD J. KIRKPATRICK, make the following statements on my oath:

"I was born April 8, 1956, and am a resident of Route 1, York, Nebraska 68467. I acknowledge that I am the father of Baby Girl S , a female child, born to R S in Taylor County, Texas, on the 11th day of January, 1981.

"I have never been legally married to the mother of this child nor have

she and I ever attempted to marry under the laws of any state or nation. To the best of my information and belief, the child is not the legitimate child of any other man and is therefore entitled to my financial support."

/s/ Donald J. Kirkpatrick

/s/ Deverne J. Noyd Witness

/s/ Mark A. Warner Witness

THE STATE OF NEBRASKA *
*
COUNTY OF YORK *

SUBSCRIBED and SWORN TO before me by the said DONALD J. KIRKPATRICK, Affiant, and Deverne J. Noyd and Mark A. Werner, Witnesses, on this the 28th day of February, 1981.

/s/ Lyle L. Murphy
Notary Public in and
for York County,
Nebraska

NO. 5,038-C

IN THE INTEREST OF	*	IN THE 326TH JUDI-
BABY GIRL S ,	*	CIAL DISTRICT COURT
A CHILD	*	OF TAYLOR COUNTY,
	*	TEXAS

ORDER

Came on this day to be considered Petitioner's request for a Court-ordered social study and the Court having considered said request is of the opinion that same should be granted.

IT IS THEREFORE ORDERED THAT J.L. Cole be and is hereby appointed investigator to make and prepare a social study covering the background, circumstances and condition of the Cross-Petitioner, Donald J. Kirkpatrick, and his home, bearing on the suitability of his home for the child the subject of this suit and for himself as a person seeking the legitimation of a child and the suitability of the child to

him and his home, such study to be contained in a written report filed herein by such investigator by the 2nd day of June, 1981.

IT IS FURTHER ORDERED that J.L. Cole be and is hereby appointed investigator to make and prepare a social study covering the background, circumstances, and condition of the child and of the Petitioner, Christian Homes of Abilene, Inc., as child placing agency, bearing on the suitability of such agency placing said child for adoption, such study to be contained in a written report filed herein by such investigator by the 2nd day of June, 1981.

SIGNED this 1st day of April, 1981.

/s/ Henry Strauss
JUDGE PRESIDING

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record and all parties to the above cause in accordance with Rules 21a and 21b, Texas Rules of Civil Procedure, on this 13th day of March, 1981.

/s/ Charles E. Myers

NO. 5038-C

IN THE INTEREST OF	*	IN THE DISTRICT
	*	
BABY GIRL S	*	COURT OF TAYLOR
	*	
A CHILD	*	COUNTY, TEXAS
	*	
	*	326TH JUDICIAL
	*	
	*	DISTRICT

FIRST AMENDED ORIGINAL PETITION
FOR LEGITIMATION OF A CHILD

This suit is brought by Donald J. Kirkpatrick who is the father of the child the subject of this suit. Cross-Petitioner was born April 8, 1956 and resides at Route 1, York, Nebraska 68467. Cross-Petitioner is the biological father of Baby Girl S .

This Court has acquired and retained continuing jurisdiction of this suit

and of the child the subject of this suit as a result of Petitioner's action to terminate the parent-child relationship.

I.

The following illegitimate child the subject of this suit:

NAME: Baby Girl S
SEX: Female
BIRTHPLACE: Abilene, Taylor County, Texas
BIRTHDATE: January 11, 1981
PRESENT RESIDENCE: Abilene, Taylor County, Texas

II.

The mother of the child is R L S , whose age is 16 and whose residence is York, Nebraska.

The biological father of the child is Donald J. Kirkpatrick whose age is 25 and whose residence is Route 1,

York, Nebraska.

Persons having a court-ordered relationship with the child are:

NAME: Christian Homes of Abilene, Inc.
PRESENT RESIDENCE: 242 Beech Street, Abilene, Texas
RELATIONSHIP: Temporary Managing Conservator

III.

No property is owned or possessed by the child the subject of this suit.

IV.

The biological father of the child the subject of this suit has executed a Statement of Paternity, a copy of which is attached to and filed with this petition, and the parent-child relationship between the biological mother and the child has not been terminated by court decree.

V.

Although the consent of neither the mother nor the managing conservator has been obtained, it is in the best interest of the child that this legitimation petition be granted. Cross-Petitioner requests the Court to consent to this legitimation.

VI.

Petitioner seeks a decree designating the child the subject of this suit as the legitimate child of the father and the father as a parent of the child.

VII.

The best interest of the child the subject of this suit will be

served by the appointment of Donald J. Kirkpatrick as managing conservator, and Cross-Petitioner so requests. Cross-Petitioner further requests that appropriate orders be made for conservatorship and support of the child.

VIII.

Cross-Petitioner requests the Court to appoint a guardian ad litem to represent the interests of the child the subject of this suit.

X.

Cross-Petitioner requests the name of the child Baby Girl S be decreed to be J L Kirkpatrick.

XI.

A social study has already been prepared and filed with the Court.

XII.

It was necessary to secure the services of Sam Moore, a licensed attorney, to preserve and protect the child's rights. Cross-Respondent Christian Home of Abilene, Inc. should be ordered to pay a reasonable attorney's fee of $2,500.00 and a judgment should be rendered in favor of this attorney and against said Cross-Respondent; or, in alternative, such reasonable attorney's fees should be taxed as costs and be ordered paid directly to the undersigned attorney.

PRAYER

Cross-Petitioner prays for judgment establishing Donald J. Kirkpatrick to be the legitimate father of the child the subject of this suit and such child to be his legitimate child, that appropriate orders be made for conservatorship and support of the child, and that the child's name be decreed as above requested.

Cross-Petitioner prays for attorney's fees, costs, and general relief.

SIGNED this 21st day of August, 1981.

Respectfully submitted,

/s/ SAM MOORE
ATTORNEY FOR PETITIONER

ROBINSON, HANNA, MOORE & HOLLOWAY, INC.
P.O. Box 3819
Abilene, TX 79604

NO. 5038-C

IN THE INTEREST OF	*	IN THE 326TH
BABY GIRL S ,	*	DISTRICT COURT OF
A CHILD	*	TAYLOR COUNTY,
		TEXAS

APPOINTMENT OF GUARDIAN AD LITEM

It has been brought to the attention of the Court that there is need to appoint a guardian ad litem.

The Court appoints STAN BROWN, Abilene, Texas, as guardian ad litem, to represent the interests of R L S , a party to this action who is a minor.

This appointment shall be effective immediately and shall remain in effect during the pendency of this suit or until further order of the

Court.

SIGNED this 28 day of August, 1981.

/s/ B.J. Edwards

JUDGE PRESIDING

NO. 5038-C

IN THE INTEREST OF	*	IN THE 326TH
BABY GIRL S	*	DISTRICT COURT OF
A CHILD	*	TAYLOR COUNTY, TEXAS

APPOINTMENT OF GUARDIAN AD LITEM

It has been brought to the attention of the Court that there is need to appoint a guardian ad litem.

The Court appoints Malcolm Schulz as guardian ad litem to represent the interests of the child, the subject of this suit, Baby Girl S .

This appointment shall be effective immediately and shall remain in effect during the pendency of this suit or until further order of the

Court.

SIGNED, this 25 day of August, 1981.

/s/ Henry Strauss

JUDGE PRESIDING

NO. 5038-C

IN THE INTEREST OF	*	IN THE 326TH
BABY GIRL S ,	*	DISTRICT COURT
A CHILD	*	OF TAYLOR COUNTY, TEXAS

DECREE OF TERMINATION
AND ORDER DENYING VOLUNTARY LEGITIMATION

On the 28th day of August, 1981, trial on the merits was held in this cause.

Petitioner and Cross-Respondent, Christian Homes of Abilene, Inc., Abilene, Texas, appeared in person and by attorney.

Respondent and Cross-Petitioner, Donald J. Kirkpatrick, Rt. 1, York, Nebraska, 68467, appeared in person and by attorney.

Also, appearing was R L S , natural mother of Baby Girl S , and Stan Brown, appointed by the Court as guardian ad litem for the mother. Malcolm Schulz appeared as guardian ad litem for the minor child, Baby Girl S .

The Court, after examining all of the pleadings including the cross-action by Respondent, Donald J. Kirkpatrick, after listening to the evidence and argument of counsel, finds that it has jurisdiction of this cause and the parties. It finds that no other court has continuing exclusive jurisdiction of this cause at this time.

No jury was demanded, and all matters in controversy, including questions of fact and law, were submitted

to the Court. All persons entitled to citation were properly cited and before the Court at said hearing.

The Court finds that citation was duly and properly issued to Donald J. Kirkpatrick, the father of the child, who did not marry or attempt to marry the mother of the child. The father was informed of his right to legitimate the child and subsequently filed Cross-Petitioner's Original Petition for Voluntary Legitimation of a Child, which Cross-Action has been duly considered by the Court.

IT IS, THEREFORE, ORDERED AND DECREED that the Original Petition for Voluntary Legitimation of a Child filed in this cause by Donald J. Kirkpatrick

be and is hereby in all matters denied. The Court finds that the denial of Donald J. Kirkpatrick's Original Petition for Voluntary Legitimation of a Child is in the best interests of the child and the Court does hereby refuse to grant its consent under Section 13.21(c), Texas Family Code, to Cross-Petitioner's request for voluntary legitimation of Baby Girl S .

IT IS, THEREFORE, ORDERED AND DECREED that all rights in and to Baby Girl S which Donald J. Kirkpatrick may have had are hereby foreclosed and terminated.

The Court finds that the Petitioner has requested termination of the parent-child relationship which now exists between R L S and

Baby Girl S .

The Court finds that the natural mother of the child, R L S , has executed an irrevocable Affidavit of Relinquishment of Parental Rights as provided in Section 15.03., Texas Family Code, which Affidavit of Relinquishment, and the Affidavit of Child Status, were properly executed by the natural mother of said child and filed with the Petition in this cause.

The Court finds that termination of the parent-child relationship as between R L S and Baby Girl S would be in the best interest of the child.

IT IS, THEREFORE, ORDERED AND DECREED that the parent-child relation-

ship between R L S and Baby Girl S be and is hereby terminated.

The Court finds that the natural mother designated Christian Homes of Abilene, Inc., as managing conservator of the child in her Affidavit of Relinquishment.

The Court further finds that the best interest of the child will be served by appointing Christian Homes of Abilene, Inc., Abilene, Texas, as managing conservator of the child.

IT IS, THEREFORE, ORDERED AND DECREED that Christian Homes of Abilene, Inc., Abilene, Texas, be and is hereby appointed managing conservator of the child having all the rights, privileges, duties and powers of a managing conservator as set forth in

Section 14.02(b), Texas Family Code, and, specifically, the power to consent to the adoption of the child and to make placement of the child for the purpose of adoption.

The Court finds that Malcolm Schulz, a practicing attorney of the Bar of this Court, did serve as guardian ad litem for Baby Girl S in this proceeding.

IT IS, THEREFORE, ORDERED AND DECREED that Malcolm Schulz be paid as a cost of court the sum of $500.00 as a fee for his professional services rendered herein.

The Court finds that Stan Brown, a practicing attorney of the Bar of this Court, did serve as guardian ad litem for R L S , a minor, the

mother of Baby Girl S , in this proceeding.

IT IS, THEREFORE, ORDERED AND DECREED that Stan Brown be paid as a cost of court the sum of $500.00 as a fee for his professional services rendered herein.

The Court finds that the Respondent Cross-Petitioner has paid into the Registry of the Court funds in the amount of $700.00, and the Court is of the opinion that said funds should be refunded to Respondent Cross-Petitioner herein.

IT IS, THEREFORE, ORDERED AND DECREED that the funds in the amount of $700.00 presently held in the Registry of the

Court be refunded by the Clerk of the Court to the Respondent Cross-Petitioner.

One-half of all costs of court expended in this cause are adjudged against the Petitioner, Christian Homes of Abilene, Inc., and the remaining one-half are adjudged against Respondent, Donald J. Kirkpatrick, for which let execution issue.

IT IS DECREED that all relief requested in this cause and not expressly granted herein be and is hereby denied.

SIGNED AND ENTERED this 3 day of September 1981.

/s/ BILLY JOHN EDWARDS
Sitting for the 326th
District Court, Taylor
County, Texas

APPROVED:

/s/ Charles E. Myers
State Bar No. 14759000

/s/ Sam Moore - as to form only
State Bar No. 14376000

/s/ Stan Brown
State Bar No. 03145000

/s/ Malcolm Schulz
State Bar No. 17847000

NO. 5038-C

IN THE INTEREST	*	IN THE 326TH DISTRICT
OF	*	COURT OF TAYLOR
BABY GIRL S A child	* *	COUNTY, TEXAS

NOTICE OF FILING REQUEST FOR FINDINGS OF FACT AND CONCLUSION OF LAW

TO:

You are hereby notified that DONALD J. KIRKPATRICK, Respondent and Cross-Petitioner, in the above cause, has this day filed a request that Judge Edwards state in writing and file the conclusions of fact found by him separately from the conclusions of law, pursuant to the Texas Rules of Civil Procedure, Rule 296. A true and correct copy of such request is attached to this notice.

DATED September 9, 1981.

Respectfully submitted,

ROBINSON, HANNA, MOORE & HOLLOWAY, INC.

P.O. Box 3819
Abilene, TX 79604
(915) 673-3792

BY: /s/Sam Moore
Bar Number 14376000

ATTORNEY FOR RESPONDENT

NO. 5038-C

IN THE INTEREST	*	IN THE 326TH
OF BABY GIRL S	*	DISTRICT COURT
A Child	*	OF TAYLOR COUNTY, TEXAS

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent and Cross-Petitioner, DONALD J. KIRKPATRICK, in the above entitled and numbered cause, hereby makes and files his request that the judge of said court state in writing the conclusions of fact found by him separately from his conclusions of law, and file such findings of fact and conclusions of law with the clerk of said court in order that they shall constitute a part of the record of the above entitled cause.

Respectfully submitted,

ROBINSON, HANNA, MOORE &
HOLLOWAY, INC.
P.O. Box 3819
Abilene, TX 79604

By: /s/ SAM MOORE
Bar Number 14376000

Attorney for Respondent

No. 5038-C

IN THE INTEREST	:	IN THE 326th DISTRICT COURT OF TAYLOR
OF	:	COUNTY, TEXAS
BABY GIRL S A CHILD	,:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above captioned cause came on for trial before the Court without a jury on the 28th day of August, 1981. All parties and their attorneys were present. After considering the pleadings, the evidence, and the argument of counsel, the Court, in response to a request from the Respondent Cross-Petitioner, Donald J. Kirkpatrick, makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. The child the subject of this suit is:

NAME: Baby Girl S SEX: Female
BIRTHPLACE: Abilene, Taylor County, Texas BIRTHDATE: January 11, 1981
PERMANENT RESIDENCE: Abilene, Taylor County, Texas

2. The mother of the child the subject of this suit is R L S .

3. The child the subject of this suit is not legitimate as to any man.

4. The natural father of the child the subject of this suit is Donald J. Kirkpatrick.

5. The natural mother of the child, R L S , has not consented to the voluntary legitimation of the child by the Respondent Cross-Petitioner, Donald J. Kirkpatrick.

6. The managing conservator of the child, Christian Homes of Abilene, Inc., has not consented to the voluntary legitimation of the child by the Respondent Cross-Petitioner, Donald J. Kirkpatrick.

7. It is not in the best interest of the child for this Court to consent to the legitimation of the child by the Respondent Cross-Petitioner Donald J. Kirkpatrick.

8. It is in the best interest of the child that the parent-child relationship between R L S and the child be terminated.

9. It is in the best interest of the child to appoint Christian Homes of Abilene, Inc., managing conservator of the child for the purpose of placing the child for adoption.

CONCLUSIONS OF LAW

1. The parent child relationship does not exist between the Respondent Cross-Petitioner, Donald J. Kirkpatrick, and the child the subject of this suit.

2. The child the subject of this suit should not be designated as the legitimate child of the father, Donald J. Kirkpatrick.

3. The father, Donald J. Kirkpatrick, should not be designated a parent of the child.

4. The parental rights of the natural mother R L S should be terminated.

5. Christian Homes of Abilene, Inc., should be appointed managing conservator of the child having all the rights, privileges, duties and powers of a managing conservator as set forth in Section 14.02 (b), Texas Family Code, and, specifically, power to consent to the adoption of the child and to make placement of the child for the purpose of adoption.

SIGNED this 24th day of September, 1981.

B. J. Edwards
JUDGE PRESIDING

Judge of the 104th District Court sitting for the 326th District Court.

NO. 5038-C

IN THE INTEREST * IN THE 326TH DISTRICT

OF BABY GIRL * COURT OF

S , A CHILD * TAYLOR COUNTY, TEXAS

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND REQUEST FOR ADDITIONAL OR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMES NOW, Respondent Cross-Petitioner, Donald J. Kirkpatrick, and files this his objection to the findings of fact and conclusions of law filed September 24, 1981, and his request for additional or amended findings of fact and conclusions of law under the Texas Rule of Civil Procedure, Rule 298, V.A.T.S.

I.

Respondent Cross-Petitioner objects to paragraph seven of the Court's findings of fact wherein it is stated "it is

not in the best interest of the child for this Court to consent to the legitimation of the child by the Respondent, Cross-Petitioner, Donald J. Kirkpatrick," for the reason that the Court does not set forth the specific facts upon which it relied to find that it was not in the best interest of the child to consent to legitimation.

Respondent Cross-Petitioner requests the Court file amended or additional findings of fact and conclusions of law setting forth the specific fact or facts upon which it based its ruling that it is not in the best interest of the child to consent to legitimation.

II.

Respondent Cross-Petitioner objects to paragraph four of the Court's findings

of fact and requests the Court to amend the findings to state that all parties stipulated that Respondent Cross-Petitioner is the biological father of the child.

III.

Respondent Cross-Petitioner requests the court amend the findings of fact and state that Respondent Cross-Petitioner has filed a statement of paternity which was legally sufficient under Section 13.02 of the Family Code which was prima facie proof of paternity under Section 13.03 of the Family Code.

IV.

Respondent Cross-Petitioner requests the Court amend its findings of fact and state Respondent Cross-Petitioner voluntarily paid support for the

child to the District Clerk of Taylor County from February, 1981, to date of hearing.

WHEREFORE, PREMISES CONSIDERED Respondent Cross-Petitioner requests the Court amend the findings of fact and conclusions of law as requested and for other and further relief to which he may be entitled both at law and in equity.

Respectfully submitted,

ROBINSON, HANNA, MOORE & HOLLOWAY, INC.
P.O. Box 3819
Abilene, TX 79604
(915) 673-3792

BY: /s/ SAM MOORE
Bar Number 14376000

ATTORNEY FOR RESPONDENT CROSS-PETITIONER

NO. 5038-C

IN THE INTEREST	*	IN THE 326TH DISTRICT
OF BABY GIRL	*	COURT OF
S , A CHILD	*	TAYLOR COUNTY, TEXAS

NOTICE OF APPEAL

COMES NOW, DONALD KIRKPATRICK, Respondent, Cross-Petitioner and files this his written notice of appeal to the judgment entered September 3, 1981.

Respectfully submitted,

ROBINSON, HANNA, MOORE & HOLLOWAY, INC.
P.O. Box 3819
Abilene, TX 79604
(915) 673-3792

BY: /s/ SAM MOORE
Bar No. 14376000

ATTORNEY FOR RESPONDENT
CROSS-PETITIONER

NO. 5038-C

IN THE INTEREST	*	IN THE 326TH DISTRICT
OF BABY GIRL	*	COURT OF
S , A CHILD	*	TAYLOR COUNTY, TEXAS

ORDER OVERRULING
REQUEST FOR ADDITIONAL
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Come on to be considered the Objections To and Request for Additional Findings of Fact and Conclusions of Law filed herein by Respondent/Cross-Petitioner, Donald J. Kirkpatrick, and after considering the same, the Court is of the opinion that the said Objections and Request should be denied and overruled.

IT IS THEREFORE ORDERED that the said Objections and Request are hereby overruled and denied.

Signed this 6th day of October,

1981.

/s/ B.J. EDWARDS, Judge
104th District Court,
Sitting for the
326th District Court

NO. 5038-C

IN THE INTEREST OF	X	IN THE 326TH
	X	DISTRICT COURT
	X	
BABY GIRL S ,	X	OF
	X	
A CHILD	X	TAYLOR COUNTY,
	X	TEXAS

STATEMENT OF FACTS

APPEARANCES:

For the Petitioner: (Christian Homes of Abilene)	Rhodes, Doscher & Heatherly 104 Citizens Natl. Bank Bldg. Abilene, Texas 79601 BY: Mr. Charles E. Myers
For the Cross-Petitioner (Donald J. Kirkpatrick)	Robinson, Hanna, Moore & Holloway, Inc. Post Office Box 3819 Abilene, Texas 79604 BY: Mr. Sam Moore
Attorney ad Litem: (R S)	Brown, Copeland & Ledbetter Post Office Box 3122 Abilene, Texas 79604 BY: Mr. Stan Brown
Attorney ad Litem: (Baby Girl S)	Schulz & Robertson Post Office Box 889 Abilene, Texas 79604 BY: Mr. Malcolm Schulz

BE IT REMEMBERED that on the 28th day of August, 1981, at 1:15 p.m., the above-styled and numbered cause came on for hearing before the Honorable Billy John Edwards, Presiding Judge of said Court in Abilene, Taylor County, Texas, whereupon the following proceedings were had:

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P R O C E E D I N G S
August 28, 1981
1:15 p.m.

THE COURT: I will call this case, Cause No. 5038-C, in the interest of Baby Girl S , a child, in the 326th District Court of Taylor County, Texas.

I would ask at this time, Mr. Myers, is Christian Homes ready?

MR. MYERS: Yes, your Honor, Christian Homes is ready.

THE COURT: All right, Is the respondent and cross-petitioner ready, Mr. Moore?

MR. MOORE: Yes, your Honor, we're ready.

THE COURT: Is the mother of the child ready, Mr. Brown?

MR. BROWN: Yes. We're ready, your Honor.

THE COURT: And is the ad litem for the child ready?

MR. SCHULZ: Yes, sir, we are.

THE COURT: All right. Thank you. Are all the witnesses here in the courtroom? Are these all witnesses?

MR. MYERS: Yes, they are, your Honor, as far as our side is concerned.

THE COURT: All right. Mr. Moore, have you [4] got some witnesses here?

MR. MOORE: Yes, sir.

THE COURT: Okay. Are there any others outside that anybody is aware of?

MR. SCHULZ: We have none, your Honor.

THE COURT: All right. If any of you are witnesses, would you stand up, please. If you are going to be a witness here today.

(Thereupon, the witnesses present in the courtroom were sworn.)

THE COURT: All right. Is the rule to be invoked?

MR. MYERS: We will invoke the rule,

your Honor.

THE COURT: All right. Let me also advise that this is to be -- I am going to order that this be a closed hearing. There is a request on file; there has been an order presented to me. If any of the parties have any objection, please lodge that to me. No objections?

MR. MYERS: Your Honor, I would like to ask that Ms. Nancy Miller, a representative of Christian Homes, be excluded from the rule, as well as R S , who is a party to this action, the mother of the child, be excused from the rule.

THE COURT: All right. Any objections to [5] that?

MR. MOORE: Judge -- We have no objection.

THE COURT: All right. Those of you who are going to be witnesses here today, the rule has been invoked, which simply

means this: that each of you intends to give testimony, or probably will be called as a witness in this case. The rule requires that you remain outside the courtroom until it is your turn to come in and give testimony. You may not discuss your testimony from this point, right now, until this hearing is concluded, with anyone, either before you testify or after you testify. You have just got to talk about other things while you are out in the hall. Now, one other thing though. There is an exception to that. If one of the attorneys, and there are four of them here, if any of them want to talk to you, they as an individual attorney can come and talk to you, but don't talk to that attorney in the presence of any other witness; you all find another room or another part of the courthouse to talk.

Now, the mother of the child, R

L S -- Where is R S ? Okay. You are welcome to stay in here if that is what you want to do. Your attorney is Mr. Brown. Why don't you just come over here and have a seat right next to Mr. Brown. The remainder of you go on outside, please.

MR. MYERS: Your Honor, with the exception of Ms. Miller, from Christian Homes, the executive director?

[6] THE COURT: Who is Ms. Miller? Okay. Who is this lady here?

UNIDENTIFIED WOMAN: Your Honor, I am just here --

THE COURT: Are you Diane Snyder: is that your name?

UNIDENTIFIED WOMAN: Yes.

THE COURT: Come here just a minute.

(Thereupon, a discussion was had at the bench, not reported.)

MR. SCHULZ: Your Honor, at this time I would like to call to the Court's atten-

tion, there is an inconsistency in the style of the pleadings and in the body of the pleadings in the First Amended Original Petition for Legitimation of a Child and in the style of some of the other pleadings, for instance, in the First Amended Original Petition to Terminate the Parent-Child Relationship, as to the spelling of the child's name.

THE COURT: S ?

MR. SCHULZ: Yes, sir.

THE COURT: Can we all stipulate how the last name is to be spelled?

MR. MYERS: It's S .

MR. SCHULZ: If you will notice, your Honor, throughout, there are variations of it.

[7] THE COURT: But the name is S ; is that correct?

MR. MYERS: That is correct, your Honor.

THE COURT: I am noting that change on my docket. Mr. Moore, you don't have any objection?

MR. MOORE: No, sir.

THE COURT: Mr. Myers, Mr. Brown, Mr. Schulz, do you have any objection?

MR. BROWN: No, your Honor.

MR. SCHULZ: No.

MR. MYERS: No, sir.

THE COURT: We know who we are talking about, but we will get the name spelled correctly. All right. We have a stipulation or two that the parties have agreed Mr. Moore, if you will recite what --

MR. MOORE: Your Honor, I think that Mr. Myers and Mr. Schulz and Mr. Brown and myself have all agreed to stipulate that my client, Donald Kirkpatrick, has paid support for the child in the amount of a hundred dollars a month since February of 1981 and that the total amount is seven

hundred dollars.

MR. MYERS: Seven hundred has been paid into the registry of the Court. As to whether or not it's support, I'm not sure that that was part of the stipulation. We will stipulate that it has been paid into the registry of the Court.

[8] MR. MOORE: And also, all parties agree and stipulate and it is admitted that Donald Kirkpatrick is the biological father of the child.

THE COURT: Is that the --

MR. MYERS: That is correct, your Honor.

THE COURT: -- stipulation, Mr. Myers? Mr. Schulz?

MR. SCHULZ: As I understand it, your Honor.

MR. BROWN: Yes. That is our stipulation.

THE COURT: All right. Is that all we

need to -- All right. Rather than summarizing any pleadings or anything or reading any at this time -- I have read the pleadings, and I am pretty familiar with the contentions of the parties, and we will go right into the evidence.

Mr. Myers, I believe you wanted to call a witness or two on the matter of the termination of the parental rights as to the mother.

MR. MYERS: We will call Jo Griffin.

THE COURT: Tell you what. We are going to go ahead and take a recess at this time so I can take care of a matter I had set at 1:30, and then we will start right back up.

---

[9] THE COURT: Mr. Myers, you may proceed.

JO GRIFFIN,

having been duly sworn, testified on direct examination by Mr. Myers:

Q. Will you state your name, please?

A. Jo Griffin.

Q. Jo, how are you employed?

A. Adoption caseworker at Christian Homes of Abilene.

Q. Jo, would you briefly explain to the Court just what the function of Christian Homes is?

A. Chirstian Homes is a licensed child placing agency. We have three areas of service, primarily: maternity program, maternity home; we have a foster care program; and then we place children in adoptive homes.

Q. Jo, through your association with Christian Homes of Abilene, have you become acquainted with R L S ?

A. Yes, I have.

Q. And through your association with R L S , has she expressed a desire to you to place her child with [10] Christian Homes for adoption?

A. Yes.

Q. Do you know the date on which the baby child was born to R L S ? Was it in January of 1981?

A. Yes, sir. January 11.

Q. In regards to her desire to give her child up, did she, R L , execute an affidavit of relinquishment of parental rights?

A. Yes, sir.

Q. In this regard, in that affidavit, did she name Christian Homes of Abilene as the managing conservator of the child?

A. Yes, sir.

Q. Did she also state that she felt that it would be in the best interest of

her child to relinquish or to terminate her parental rights and to place the child for adoption?

A. Yes, sir.

Q. Likewise, did R execute an affidavit of status in this regard?

A. Yes, sir.

Q. And in the affidavit of status, did she state that she and the natural father of the child had never married nor had ever attempted to marry under the laws of any state or nation?

A. Yes.

[11] Q. Did she also state that the paternity as to the child had never been established?

A. Yes.

Q. And did she name the father of the child?

A. Yes.

Q. And who did she name as the

father of the child?

A. Donald Kirkpatrick.

Q. Jo, backing up to the affidavit of relinquishment of parental rights. The affidavit is an irrevocable affidavit. Did she understand the irrevocable nature of that affidavit when she executed it?

A. Yes, sir, I believe she did.

Q. Was it explained to her by you?

A. Yes.

Q. Jo, do you have any feelings as to whether or not it would be in the best interest of this child to terminate R L S 's parental rights to that child?

A. Yes. I believe it would be.

Q. And do you feel that it would be in the best interest of the child to name Christian Homes of Abilene as the managing conservator of that child?

A. Yes, sir.

Q. And are you asking the Court today to terminate R 's rights to that child and to so name Christian Homes of Abilene as the managing conservator?

[12] A. Yes, sir.

Q. Does Christian Homes of Abilene have a plan for the child, Jo?

A. Yes, we do.

Q. What is that plan?

A. To place it in an adoptive family.

Q. Has Christian Homes gone so far as to select prospective adoptive parents in the case?

A. Yes, we have.

MR. MYERS: I pass the witness, your Honor.

THE COURT: Mr. Moore, do you have any cross?

MR. MOORE: The only issue we are trying at this moment is to determine as

to the mother?

THE COURT: Yes.

MR. MOORE: I will reserve my questions.

THE COURT: Okay. Mr. Schulz.

CROSS EXAMINATION

BY MR. SCHULZ:

Q. This R L S that you speak of, do you see her here present in court?

A. Yes, sir.

[13] MR. SCHULZ: That is all.

THE COURT: Mr. Brown.

CROSS EXAMINATION

BY MR. BROWN:

Q. Jo, you stated that prior to R L S signing the mother's affidavit of relinquishment of parental

rights that you went over that instrument with her and explained it to her?

A. Yes, I did.

Q. Are you satisfied that she fully understood the nature of that instrument and the consequences of her signing it?

A. Yes, sir.

Q. Okay. Particularly, I will ask you again, did she fully understand the irrevocable nature of this instrument?

A. Yes, sir, I believe she did.

Q. All right. And you are satisfied that she signed it voluntarily and understanding the consequences of it?

A. Yes.

Q. And you do believe that the termination of R L S 's parental rights with regard to the child in question would be in the best interest of the child.

[14] A. Yes, sir.

Q. And you have also stated that naming Christian Homes of Abilene, Inc., as the managing conservator of the child would, in your opinion, be in the child's best interest?

A. Yes, sir.

MR. BROWN: That is all I have.

MR. MYERS: I have no further questions, your Honor.

THE COURT: Do you have anything else, Mr. Moore? Anybody?

MR. SCHULZ: No further questions, your Honor.

THE COURT: Ms. Griffin, at the time she executed that affidavit of relinquishment, was she represented by counsel or did she have an attorney or guardian ad litem present?

THE WITNESS: No, sir.

THE COURT: Okay. That is all I

have. Thank you.

MR. MYERS: Petitioner, Christian Homes, rests, your Honor.

THE COURT: All right. Mr. Moore, you may [15] proceed. I am going to reserve any ruling on the request to terminate the parental rights of the mother until I have heard all of the evidence.

You may step down.

MR. MYERS: Your Honor, may this witness be excused?

THE COURT: Probably not.

MR. MOORE: I may have -- I would like to reserve any cross-examination until a later time.

THE COURT: Yes. Let's keep her around a little while.

MR. MOORE: Your Honor, I would like to call R S to the stand as an

adverse witness.

R L S ,

having been duly sworn, testified on direct examination by Mr. Moore:

Q. Would you state your full name please, ma'am?

A. R L S .

Q. R , I have never met you before. My name is Sam Moore, and I represent Donald Kirkpatrick here today; you understand?

[16] A. Yes.

Q. May I call you R ?

A. Yes.

Q. How old are you?

A. Sixteen.

Q. And where do you live.

A. I live in York, Nebraska.

Q. How long have you lived in York, Nebraska?

A. For about the past four years.

Q. And you live there with your parents?

A. Yes, I do.

Q. What are their names?

A. T N S and D M S .

Q. Rachel, how old were you when this child was conceived?

A. Fifteen.

Q. Fifteen years old? When is your birthday?

A. October 1.

Q. Okay. Now, I think everybody agrees that Donald Kirkpatrick is the biological father.

A. Yes.

Q. Had you gone with Donald for some time before this child was conceived?

Q. Yes. Probably about -- It was almost a year and a half.

[17] Q. Before conception?

A. Yes.

Q. Okay. And did you and Donald see a lot of each other during that period of time?

A. Yes. About every weekend.

Q. Okay. Did your parents know about that relationship?

A. No.

Q. They didn't know about it at all?

A. No.

Q. When did they first learn of your relationship with Donald?

A. Well, my mother was the first to learn about it, which was about Christmas.

Q. The Christmas before?

A. Before I conceived.

Q. Okay. And how did she learn about it?

A. I told her. Because at Christmas I was all alone at my grandparents',

or at my grandmother's, and I was afraid that I had conceived then.

Q. By Donald?

A. Yes. By Donald.

Q. And you told your mother at that time that you had had a sexual relationship with Donald Kirkpatrick?

A. Yes.

[18] Q. And that you were afraid that you were pregnant at that time?

A. Yes.

THE COURT: What year are we talking about?

THE WITNESS: A. Okay. That would be 1980. Or it might have been 1979, at Christmas.

THE COURT: December 1979, January 1980?

THE WITNESS: A. Yes.

THE COURT: Okay.

MR. MOORE: Q. Do you know what

month the conception for this child would be?

THE WITNESS: A. Yes. In April.

Q. April?

A. Yes.

Q. Okay. So you thought you were pregnant before that time?

A. Yes.

Q. At Christmastime?

A. Right.

Q. Hadn't Donald been around your house before Christmas of 1979?

A. Well, just to drop me off. He had never been inside.

Q. How many times would you say he had dropped you off at your house before Christmas of '79?

[19] A. Well, quite a few times. I couldn't count them.

Q. He had been around you house quite a lot, had he not, during that year

and a half period?

A. Yes.

Q. Do you say that your parents didn't know about the relationship simply because you didn't tell them, or they just weren't aware or didn't care?

A. No. I think it was just that they weren't aware and that I didn't tell them.

Q. It wouldn't have been difficult for them to see Donald Kirkpatrick around your house during that period of time, would it?

A. No. And they did a couple of times, but --

Q. They never asked you what he was doing there?

A. Yes, they did, but at that time I -- He has a sister, and that was my girlfriend, and I would tell them that he came to pick me up. He was her brother,

and they believed that.

Q. Okay. So you misled your parents?

A. Right.

Q. Okay. But in December of '79 they did learn that you had had a relationship with him?

A. Just my mother.

Q. Did you tell her over what period of time it had gone on?

[20] A. No, I didn't.

Q. What did your mother tell you about that?

A. She told me that it would be wise to not see him any more.

Q. Did she you forbid you at that time to see Donald?

A. Yes, she did.

Q. What did she tell you, exactly?

A. She told, she said, "Promise me that you won't see him any more," and I

told her that I couldn't promise that, and I never did. And so I did continue to see him.

Q. Did your mother know that you continued to see him?

A. I don't think so.

Q. Did he come around your house from December until April?

A. Yes. Sometimes.

Q. He did come around?

A. Yes.

Q. And your parents did see you together during that period?

A. No.

Q. Never?

A. I don't -- They might have. They never told me about it, or they never asked me any questions about it.

Q. All right. So your mother told you she thought [21] it would be wise for you to not see Donald any more, but she

didn't impose any sanctions or anything of that nature; she didn't make any threats or anything if you did see him?

A. No, just that -- except that if I -- if I kept on continuing this, that she would have to talk to my dad about it and see what they should do.

Q. But you let her know that you intended to continue seeing -- or at least you wouldn't promise not to see him any more?

A. That's right.

Q. She knew that when you finished your conversation?

A. Yes.

Q. That you probably would see him again?

A. Yes.

Q. Okay. And she didn't do anything further at that point to prevent you from seeing him?

MR. MYERS: Your Honor, we are going to object to him constantly leading the witness.

MR. MOORE: This is an adverse witness, your Honor, and I think I've got the right to lead or put words in her mouth or do anything I want to.

THE COURT: Okay. Let's move along. I agree. You may lead her, within reasonable bounds. She is sixteen years old.

MR. SCHULZ: Your Honor, as to my party, [22] it's hearsay.

THE COURT: All right. I will sustain any hearsay as to you. Is that what you said?

MR. SCHULZ: Yes, sir.

THE COURT: Okay. Go ahead. Rephrase the question. Start over. I'm lost. Go ahead and ask the question again, then we will start from there.

MR. MOORE: Q. Really what I was trying to establish was that your parents, at least one of your parents, did know about the relationship for some time, knew it was going on, and allowed it to go on.

THE WITNESS: A. No, I wouldn't say that, because she didn't know about it, so she wasn't allowing it to go on.

Q. Well, at least when you had your meeting in December your mother knew that you were having a sexual relationship with Donald and she told you it would be unwise for you to see him any further, but she didn't impose any sanctions on you, and you let her know that you intended to continue to see him.

A. Well, I didn't let her know. I just told her that I would not promise her that. But I don't think she knew that I was continuing to see him. Had she known, she probably would have grounded me or

done something else.

Q. Okay. But you think it is possible either one or [23] both of your parents might have seen you with Donald during that period?

A. That could be, but I never heard about it.

Q. Okay. Now, R , at the time that you discovered that you were pregnant, is that when you decided that you wanted to have the baby and give it up for adoption, at that moment?

A. No.

Q. Was it after some discussion with your parents that you decided that it would be best for the child if you gave it up for adoption?

A. Well, it was after that, but mostly when I came to the conclusion myself. I concluded myself that that was probably what would be the best. I would

have never come to Christian Homes if I would have thought that I wasn't going to give it up at all.

Q. Okay. And you decided that would be best for you?

A. I figured that would be in the best interest for the child, myself, and Don.

Q. You figured it would be the best interest for Don?

A. Also.

Q. Okay. Now, R , after you discovered you were pregnant, did your parents forbid you to see Donald any more?

A. After I told them, you mean?

Q. Yes, ma'am.

[24] A. No. As a matter of fact, they -- They let me see him a couple of times after they knew that I was pregnant.

Q. Okay. And did you -- You and Don have had a number of conversations

about the child, about your relationship, and about what should be done, haven't you?

A. Yes.

Q. And you have also exchanged a good deal of correspondence back and forth?

A. Yes.

Q. When you were overseas, and then when you came to Abilene to Christian Homes, you wrote a number of letters, and he wrote letters to you?

A. Yes.

Q. Did you, R , try to get Don to relinquish any right or any claim that he might have to this child from the very start?

A. I don't understand your question.

Q. Okay. Let me put it another way. First let me ask you about your relationship with Don. What was the relationship?

Were you in love with Donald?

A. I thought I was. It was an infatuation.

Q. Do you believe that Donald was in love with you?

A. I did for a time.

Q. Okay. And during this year and a half before the child was conceived, did you believe that you loved Donald and [25] he loved you?

A. Yes.

Q. And for some time after the child was conceived, you believed that you loved Donald?

A. Yes.

Q. Up until the birth of the child, even?

A. Yes, I would say so.

Q. Okay. And you believed that he loved you?

A. Yes.

Q. And your love was expressed many

times in correspondence?

A. Yes.

Q. Okay. Now, let me ask you this: Did you try to convince Donald to relinquish any rights he would have to the child after the time you left York, Nebraska, and came to Christian Homes?

A. I still don't understand? What do you mean with relinquish his rights?

Q. Give up any rights that he might have as the biological father, sign papers to give up any rights that he might have--

A. Oh.

Q. -- as a biological father.

A. Oh. Yes.

Q. You did that?

[26] A. Yes.

Q. And did you put it in such a way that, "If you love me and you want what's good for me and you love the child, then you will sign these papers and give

up those rights"?

A. I think sometimes I did, yes, but not all the time.

Q. You were trying to use his love for you as a persuading point?

A. I don't think that was always true. Because a lot of times I spoke with him like on the phone and stuff, and I did tell him I felt he was being selfish, but I also told him that I felt he wasn't ready to be a father, either, even if he did get married.

Q. Now, R , I want to ask you some questions about your correspondence and what's in it, and I want you to know I have copies. I have the original and copies of all the correspondence.

A. I'm sure you do.

Q. And I don't want to go through each one of those with you, but there are certain things that I would like to ask

you about. It may be necessary for us to look at some of the letters. I want to ask you some questions. Specifically, you mentioned that -- you said it was being selfish of Donald to exercise any rights as a father.

A. That's right.

Q. Is that true?

[27] A. Yes.

Q. And did you tell him in your letters, "Donald, if you love me, you'll do what I want you to do," or words to that effect?

A. I don't rightly remember. I might have done that.

Q. It's possible you did that?

A. It could be.

Q. If it is shown in any of the correspondence that you wrote to Donald, you don't have any disagreement with that, do you?

A. Not if it's on black and white.

Q. Did you have that feeling at one time?

A. What feeling?

Q. "Donald, if you don't give this child up for adoption, you don't love me."

A. Yes.

Q. You wanted Donald to show his love for you by giving up any rights that he might have?

A. I wanted him to show his love for our child by giving up his rights.

Q. Let me ask you this, R : Do you believe that Donald had a very, very deep and intense love for you?

A. Not any more.

Q. At the time?

A. At the time I really was very mixed up. Sometimes [28] I wasn't sure that he did love me.

Q. Do you believe now that he didn't

love you because he has filed this petition to legitimate this child? Is that why you believe he doesn't love you?

A. That's part of it.

Q. Okay. Donald wanted this child from the very -- almost the very start, didn't he?

A. Yes.

Q. He expressed his desire to have the child because he loved you, and from the very start he told you he loved this child?

A. Yes.

Q. On many occasions?

A. Yes.

Q. And at one point, sometime near the time the child was born, Donald expressed some indecision about what he should do, didn't he?

A. I don't think so. The only time that I -- that I realized that he had

changed his mind -- Because all along in my pregnancy I thought he would go along with me. That is what he had written to me in his correspondence. And I did not know that he had changed his mind until Tuesday when Nancy brought me some mail, and one letter, which was -- looked kind of official, which was from a lawyer I guess that Don had gotten in York, and a letter written personally by Don saying that [29] he had changed his mind. That was on the same day.

Q. When did Donald ever tell you that he wanted to sign the papers and do what you wanted him to do?

A. He told me a lot of times in correspondence, and later he told me that he would not -- he would do whatever I thought was right and that my feelings counted and he didn't care what anyone else thought.

Q. Okay. When you discovered that Donald truly wanted the child, he wanted to legitimate the child, did that hurt you?

A. Yes, it did.

Q. And Donald knew that, didn't he? Donald knew that would hurt you?

A. That's right.

Q. Very badly?

A. Yes.

Q. Do you believe that Donald, during that period of time, wanted to do something to hurt you, R ?

A. No, I don't think he intentionally wanted to.

Q. Do you believe that he wants to hurt you now?

A. No, not personally me, but I think he realizes that he is hurting me very badly.

Q. R , during the time that you

have known Donald -- And you have known him very well, haven't you?

A. Yes.

Q. Has he always been honest and sincere in his [30] expressions to you?

A. Yes.

Q. Do you believe that he is honest and sincere in his love for this child and his desire to have this child and raise it and be morally, legally, and financially responsible for it?

A. I don't know, because he's never said that much about loving the child without connecting it to me.

Q. In his letters to you, didn't he express a love for you and the child?

A. Yes.

Q. And in your letters back, would you make a statement such as, "Donald, I know you love me, I know you love our child"?

A. Yes.

Q. Okay. And during that period of time when you were trying to get him to go along with you and what you wanted to do, you told him that you wanted to marry him in the future?

A. For a while, I think I did.

Q. Up until the time the child was born you were making such statements in your correspondence; is that true?

A. Yes, I believe so.

Q. Okay. And that even if Donald, if he would give up this child, that when you got to be eighteen you would get married and you would have other children, you wanted to have [31] other children with Donald, you wanted his children?

A. Yes. But this was still when I thought I loved him.

Q. But you know now that there is no future for you and Donald?

A. I know that for sure.

Q. Okay. And do you believe Donald realizes that?

A. Well, I certainly hope so.

Q. Okay. You have not had any contact with him whatsoever since about February or March of this year?

A. I'm not for sure. He gave me a call one time, and I'm not for sure when it was. I believe it was right before I left for Europe, I think. I'm not for sure. He called me up one time.

Q. Okay. But you also called him a couple of times after you got back to York, didn't you?

A. Yes, I did.

Q. Okay. But he has not tried to contact you since that time?

A. Not since that time, no.

Q. And you have not tried to contact him since that time?

A. No.

Q. And you both realize that the relationship is dead and gone?

[32] A. I can't speak for both of us. For me, yes.

Q. Okay. Now, R , I believe you have stated, or will state, that you believe that it is in the best interest of the child that Christian Homes take it and put it in a home somewhere.

A. That's right.

Q. Even though you don't know where the child will be placed?

A. Right.

Q. You don't know the people?

A. No.

Q. Do you believe that Donald Kirkpatrick would be a bad father?

A. Not a bad father, but just not too good parents.

Q. Too good? T-o-o or t-w-o?

THE COURT: Like one, two --

THE WITNESS: A. Yeah.

THE COURT: -- three, four, five? A number?

THE WITNESS: A. I mean he wouldn't be --

THE COURT: As good?

THE WITNESS: A. Good enough. I mean, it's not too good.

MR. MOORE: Q. The child would be better [33] with a mother and a father?

THE WITNESS: A. I believe so. But there is a little bit more attached to that.

Q. Well, let me ask you this: Is there any reason, other than the fact that Donald is a single parent, that you believe it would not be in the child's best interest for him to be a father?

A. Yes.

Q. Would you tell me what that is,

please?

A. First of all, because -- I haven't had contact with him lately, but the last time that I have talked to him, spoken to him, he was still living at home with his parents and two sisters. The home is run down. When I left it, they had a skunk living in it. The atmosphere, I feel, is something not good for a child. And his father drinks, he has a bad habit of smoking. If he got the child, he would have to work to help support it, which leaves the mother or the sister to take care of the child, to be the mother. The -- Well, I think that either he would still be living at home or in some way would be connected to his parents if he were to have the child to raise it, because I don't think he has ever been independent by himself, totally.

Q. R , are you saying that his

parents are bad people.

A. Maybe not his mother.

[34] Q. Are those the parents that you referred to in your letters as mom?

A. Yes.

Q. How did you refer to his father? Did you call him dad?

A. No, not usually. I have never felt very close to his father.

Q. These things that you say would be bad for the child, those were things that you knew about all during your relationship with Donald, weren't they?

A. That's right.

Q. And those were things that you knew about when you said that you wanted to marry him and live with him when you got to be eighteen?

A. That's right, but I wasn't about to live with his parents.

Q. Is there any reason that Donald

would have to live there in the house with his parents?

A. It might be for financial reasons. At the time, he was living there because someone else had moved into the house which is next to his grandmother's, and that was why he had moved back home. But he was not paying any kind of rent on that house. He might have been paying the bills; I don't know.

Q. Are there any other things that you believe that [35] you would like to tell the Court would not be in the best interest of the child if Donald were the father?

A. To me, personally, I think it's important that my child grows up knowing God, which she will not know living with the Kirkpatricks. Also --

Q. Is there any reason that Donald -- Do you believe that Donald believes

in God?

A. No.

Q. Not at all?

A. He believes there is something up there. I have talked with him about this. But he has never for sure said that that is God.

Q. R , you have said that their house is run down, that they have some bad habits like smoking, and his father drinks. Does Donald drink?

A. No, because he is an epileptic, and it's not good for him.

Q. Okay. His father drinks, Donald smokes, their house is run down and perhaps not as clean as it should be?

A. Not as clean? It's not clean at all.

Q. Okay. Their house is not clean. How do you know your child -- what environment your child is going to be in if

the Court terminates it?

A. Because I have been assured by Nancy and Jo and the people I have talked to at Christian Homes that have told [36] me that the parents that they choose --

Q. You have stipulated with them that the parents will not smoke and will not drink and will --

A. They are Christians, and I -- Knowing Christians, they usually do not smoke or drink or have any such problems as that. They might have health problems, but nothing like bad habits. They believe in the Bible.

Q. What other bad habits does Donald have?

A. Well, to me, he cusses a lot.

Q. All right. I want you to tell me, R , I want you to tell me every bad thing that you know about Donald. We already know he smokes, and he doesn't

believe in God, you don't think.

A. Okay. But just -- To me, that's a bad habit. To a lot of people it might not be.

Q. I am not arguing with you, R . I just want you to tell me every bad thing that you know about this boy. Is he a slackerd? Does he not work?

A. No, he works. But I feel like a lot of times he has been financially supported by his father. When I first got to know him, he didn't keep himself very clean, all over. He usually -- He usually got cleaned up for me. And --

Q. He got cleaned up when he saw you?

A. Yes. Or when we were going to go out or something.

Q. All right. How did you know he was dirty the other [37] times? Did you sneak around and see him?

A. No. I've seen him a lot of times

dirty after work, or I've gone with him out in the fields.

Q. Okay. What else? He uses bad words?

A. Yeah. And -- That's really just about it.

Q. Of course, those are all things -- You didn't discover those after you terminated your relationship with him; those are things you knew from the very start.

A. Sure. And I'm sure that I have some bad habits.

Q. Evidently his bad habits were not so bad that you terminated your relationship with him.

A. No, but a lot of his bad habits -- Usually he kept his language a lot to himself when I was around him.

Q. Did you ever use bad language, R ?

A. Yes, I did.

Q. And is that one of the reasons you don't think you should be the mother of the child?

A. No, but I'm not fighting to be the mother of the child.

Q. You don't want the child, you want to give it to Christian Homes and let them put it wherever they will, with whoever they will, but you just don't want him to have it?

A. That's not it. Because I have an assurance from Christian Homes that my baby is going to be placed in a good home. I'm adopted myself, and I rely on them, and I have faith [38] in them that they are not deceiving me by telling me that my child will have a good home with two Christian parents. And they have told me that those parents have to have been married for a certain period of time and have

a certain income, and these parents have been waiting a long time to have a child. And that means a lot to me, the fact that they would wait to have a child, because they maybe cannot have one themselves.

Q. They would wait a long time and they want very badly to have a child that is of no blood relation to them. Do you think that it would be extremely important to a father who has a blood relationship with a child to let that child go?

A. Yes. Just as important as it was to me.

Q. So you want Donald to do what you have done?

A. Yes, I do. That's for the best interest of our child.

Q. Are there any other reasons that you know about that the Court should not recognize him as the father, not legitimate this child, other than what you have

told me?

A. Just because of his living circumstances. And because he has never really shown to me that he really loves that child that much except in his letters. But the thing was, he had always connected it to me, and I feel like by getting the child maybe he thought he would get me.

Q. R , Donald knew that if he pursued this action for his child that it would sever his relationship with you,[39] didn't he?

A. I don't know.

Q. You made that clear to him, didn't you?

A. Yes, I did.

Q. So he knew that. Do you think that if he loved you and had no love for the child that he would pursue this action when he knew it was going to sever his relationship with you?

MR. MYERS: Your Honor, we are going to object to the leading at this point because I believe it is going a little bit too far.

THE COURT: Well, it's already -- Let's just go to the facts, and I will make those decisions.

MR. MOORE: Q. Would Donald have had a chance with you later when you got older, as far as a marital relationship were concerned, if he had gone along and done what you asked him to?

MR. MYERS: Again, you Honor, that is speculative and argumentative, and we object to it.

THE COURT: I think she has pretty well answered that. I think I know the answer too. Why don't we just leave it alone. Go to something else, Mr. Moore.

MR. MOORE: That is all the questions I have.

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[40] CROSS EXAMINATION

BY MR. MYERS:

Q. R , how did you first meet Donnie?

A. I met him through his sister, which -- When I moved to America, a girl from our church used to go out there to go horseback riding a lot, and his sister's name is Diane, and I learned to know Diane real well, and I used to go out there a lot. And this is how I met Don.

Q. Did you parents know that you were going out there to see Donnie, or did they think that you were going out there to visit with Diane.

A. They usually thought I was going out to visit Diane, yes.

Q. Did you go out there quite frequently? Or just explain to the Court --

A. Yes. Like I said before, about

every weekend.

Q. They have some horses out there that you like to ride?

A. Yes.

Q. You stated a moment ago that Donnie came to your house frequently. Did he come and have dinner, or just how was that?

A. No. He just would come maybe like to pick me up or to drop me off at home. He never came inside. He usually didn't even get out of his pickup.

[41] Q. Was Diane with you all most of the time when he would come by the house?

A. Well, in the beginning of our relationship, yes, she was with him most of the time.

Q. All right. R , when was the first time, to your knowledge, that your father was aware of anything going on between you and Donnie?

A. To my knowledge, I don't think he knew until I told him about the pregnancy.

Q. I see. When was the first time that Donnie asked you to marry him?

A. Well, it was before I left for Holland in 1980, and -- because then I was already pretty sure that I was pregnant. I hadn't done a test or anything, but -- that's when he asked me to marry him.

Q. He never mentioned marriage prior to any question of pregnancy, did he?

A. Well, we had talked about it, but he had never asked me.

Q. I see. But it never became a serious issue until you thought that you were pregnant?

A. That's right.

Q. After you found out that you were pregnant, R , did you discuss this matter in detail and in depth with your parents and with Donnie?

[42] A. Yes.

Q. When you discussed it with Donnie, did he ever indicate to you that if he could not have you he would love to take care of that child for the rest of that child's life?

A. No.

Q. Have you and Donnie ever discussed any type of moral responsibility which may be involved in an illegitimate pregnancy such as this?

A. What do you mean, moral?

A. [sic] Has Donnie ever said that just because you got pregnant you have a responsibility to get married and to raise that child?

A. I couldn't say directly Don. His father had talked to him about that, and Don did write me a letter that his father felt that since we were the ones that had gotten ourselves in this situa-

tion we should be responsible enough to get married and to take care of the child, that it was our duty, and I felt strongly that Don felt the same way, that he was backing that up. Otherwise I don't think he would have written me a letter about it.

Q. Well, do you feel that he wanted to marry you because he loved you or because he felt this responsibility?

A. Well, I think during the pregnancy it was probably both.

Q. But he never said, "If I can't have you, I want [43] the baby"?

A. No, not -- not during the pregnancy.

Q. Has he ever indicated to you that he has any love or feels any responsibility to the baby alone?

A. No. It has always been attached to me.

Q. Have you ever received any cor-

respondence or have you ever discussed this matter with Donnie's father?

A. Yes. I received two letters from Jim.

Q. What was his attitude toward this pregnancy?

A. He felt that part about the responsibility, and he felt that raising a child from like one to twelve was a snap, and that if I decided to get married that they would welcome me into their family without any questions asked, and also that -- He did state, though, in one of the letters, that it was up to me and Don, whatever we decided.

Q. Did Donnie, over the period of time that you all discussed what to do, did he indicate that whatever you decided would be all right with him?

A. Yes, he did.

Q. When was the very first time that

you realized that he was going to try to keep this baby in the manner that he is now seeking?

A. It was that Tuesday when -- You mean keep the baby, or -- You mean fight for it?

Q. To fight for it, yes, ma'am.

[44] A. Well, that wasn't until after I got home. I had seen him on a Monday, and sometime during that week I received a letter from Sam Moore stating in there that Don wished to file this suit, and then I realized that he was going to go ahead and fight for the baby. That was the first time.

Q. Well, let's back up just a moment. I believe you testified a minute ago that you got a letter while you were in the hospital.

A. Yes, I did.

Q. And that letter stated that he

was going to fight for the child; in effect, that is what it said?

A. Yes, it did.

Q. You indicated that it was a letter that looked like it was kind of official, from a lawyer. Is that the letter that we are talking about?

A. Yes.

Q. Okay. After you received that letter, did you telephone Donnie?

A. Yes, I did. I was very upset about it. And I called him and talked to him, and I tried to explain to him my feelings about why I gave up the baby and why I felt it would be foolish for him to fight for it, just for the financial reasons, as -- just the costs, you know, to take it to court, and also financially what it would cost for him to take care of the child, and that his mother would have to be talking care [45] of the child if he

did so get the child. And he -- I guess I convinced him. I don't know what -- But he said that, then, after our conversation, he told me to go ahead and call Nancy and tell her to go ahead and send the papers and that yes, he would sign then.

Q. So he agreed, even after he had sent the letter saying that he was going to fight for the child, after you talked to him, he then agreed that he would not fight for the child?

A. Yes. He was really kind of swinging back and forth. I don't think he really knew what he wanted.

Q. All right. Did he do this a lot? Did he swing from one way to the other?

A. Yes. Mainly after -- after the baby was born, or -- Well, I guess a little bit before, because I guess he had to send the letter, but it came as quite a shock to me that all at once he had decided dif-

ferently from what he had been writing to me all along.

THE COURT: Just a moment. Mr. Moore, did you need your partner in the courtroom for any reason?

MR. MOORE: He may have --

THE COURT: Why don't you talk to him.

Why don't we take a five-minute break at this time, okay?

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[46] THE COURT: Let's move along to get through today.

CROSS EXAMINATION (Cont'd)

BY MR. MYERS:

Q. R , at the time that you signed the relinquishment that you signed here in the hospital, the relinquishment of your parental rights --

A. Yes.

Q. -- what was your understanding as to Donnie's attitude as to whether or not

he would go along or not go along?

A. Well, it was right -- the day after I had called him, and -- that he had said, told me to call Nancy and have her send the papers, and my attitude then was that he would sign the papers and go along with giving up the child.

Q. So when you signed, you thought he was going to go along with you; is that right?

A. Yes, I did.

Q. All right. R , when you went back to York, Nebraska, right after the baby came, how many times have you seen or talked to Donnie since you have been home?

A. Well, I think I talked to him four times, and I [47] saw him once.

Q. All right. Let's go back to the first time that you saw him and spoke with him. Would you tell the Court -- Did you talk to him on the telephone, or did he

come to your house, or what happened?

A. Well, the first time I talked to him on the telephone, I asked him if he had signed the papers, and he said he hadn't because there was a paragraph in there, how it was stated, he didn't like that, how it was stated, and I told him that Nancy had said they had a certain kind of rules that they had to go by, or certain things that they could only put in there, and that that came closest to my situation.

Q. All right. At this time that you visited with him, did he show any concern or love for the child other than as related to you?

A. No.

Q. Did he tell you the one time that you saw him that he loved the child and wanted to take the child and live with the child until the child grew up?

A. No.

Q. All right. The second time that you talked to him in York, would you relate to the Court how that came about?

A. Do you mean on the phone, or --

Q. Yes, ma'am.

[48] A. That was when I had received the first papers from Sam Moore, and that was when I realized that he was going to take it to court and fight for the child, because the first time, when he said he wasn't going to sign the papers, I just thought that it would go through a legal process where if the father refused to sign the papers that Christian Homes somehow can get that righted and he doesn't have to sign them and they can go ahead and give the child up for adoption.

Q. All right. Was this the first time that you knew for sure he was going to fight for the child?

A. Yes.

Q. Did he tell you why?

A. Well, I don't remember now.

Q. Did he say anything to the effect that he would not let this go for longer than a certain period of time?

MR. MOORE: Object to him leading his witness, your Honor. This is his witness.

THE COURT: I am not sure that it is. I will overrule your objection.

MR. BROWN: It's my witness, your Honor.

THE COURT: I will overrule your objection. Go ahead.

MR. MYERS: Q. Did he say that he would [49] only try to fight for the child for a certain period of time?

THE WITNESS: A. Yes, he did. He told me that he wouldn't let it go on any longer than six months.

Q. Did he tell you why he was putting

some kind of time limitation on it?

A. No, he didn't.

Q. R , the third time that you talked to him, what was the nature of that conversation?

A. Well, I had told him -- I had gotten mad at him for not telling me that he had decided to fight for the child, and I -- after I had got Sam's papers, I called him and I told him that I thought he was a coward for not telling me that he was planning to do this. He had never given me anything to think that he would do such a thing. And I called him about the papers, and I had told him, during that conversation, that if I was to be expecting any more papers I would like to know ahead of time, and so he had returned a call to me telling me that I was to receive some papers from Sam Moore, and he did not say -- I asked him what they were about, and he

didn't know.

Q. All right. Well, on this third occasion that you had to talk with Donnie, did he express any love or concern for the child?

A. No.

Q. Now, would you tell the Court about the fourth time [50] that you talked to Donnie. Is the fourth time the very last time you have?

A. Yes, it is.

Q. All right. Would you tell the Court about the very last time, the fourth time, that you talked with Donnie.

A. The last time I talked with him, he called me, also. And it was on a Saturday, because my parents were gone to see my grandparents, and -- Well, it must have been when R was still in school, because she was in Lubbock. That's my sister. And he called me, and at first I didn't

recognize who it was, and he said it was Don, and I asked him his reason for calling, and he stated that he just wanted to see how I was doing because he cared about me, and I told him that I was doing okay except that I was worried about the child, and I told him also, then, for sure, that our relationship was over with and that I didn't want to have anything more to do with him. And I asked him if he knew any more about the child, or if I was to be getting any more papers, and he said no, and that the reason that it was kind of at a standstill at that time was because -- something about ninety days, something was going to take ninety days, and I don't know what he was talking about.

Q. R , in the four times that you talked to Donnie since the baby has been born, he has never expressed any concern as to the welfare of the child, has he?

A. No, he hasn't.

[51] Q. He has never expressed any independent love for the child, either, has he?

A. No.

Q. Let me digress just a moment, R . At the time that you and Donnie first started dating, how old was Donnie?

A. Let me think. I think he was twenty-two.

Q. And how old were you?

A. It was at the end of my eighth grade year, and I think I was fourteen.

Q. I see. Did you feel like you were -- Looking back on it, R , do you feel that during this period of your life you were pretty mixed up, didn't really know what you were doing as far as your involvement with Donnie and your attitudes that you had?

A. No, I don't think I was mixed up, but I -- At that time, I didn't really know

what I wanted out of life, except that I received sort of security from Don, and at that time my mother had started working, something that she had never done before, and I think I kind of took shelter --

Q. Do you feel --

A. -- in this relationship.

Q. Yes. Do you feel that, over the last year, I guess it's been, that your has been a little more organized, a little more straightened out since you have come to grips with some things?

[52] A. Yes, definitely.

Q. And you feel that it would be in the best interest of the child that that child be placed for adoption, do you not?

A. Yes, I do.

Q. Now, it was mentioned just a moment ago that you yourself were adopted.

A. Yes, I am.

Q. Do you harbor, or do you feel any

resentment toward your natural parents because of the adoption?

A. No, I don't. And especially being put in the same situation, I feel like my mother probably didn't have any other choice than to do what she did. It was in Korea, and Korea is not known for being a very civilized type of country, and she was probably pretty much in poverty. But that's just my own theories about it.

Q. Donnie has expressed some concern to you about this, hasn't he?

A. Yes. One time we did get into an argument about that, and he figured that I must hate my parents, my real parents, my biological parents, because they had given me up for adoption, and that why wouldn't I want to go and seem them now and see why they had done this, and I assured him that I was perfectly happy with the parents that I have now, I've grown up with them, and

I'm happy with them. And he thought that if I gave the child up for adoption and if he [53] agreed that the child that I have given away would grow up hating us, me and Don, then, because the child would think that we didn't love her. But I've never had such feelings, and I'm adopted, and I have never had the feeling of having to look up my parents to see why they adopted me out, because I'm perfectly happy the way I am.

Q. And there is not any doubt in your mind that an adoption in this case would be much better for the child than to allow the child to go back --

A. There is not doubt.

Q. R , I will show you what has been marked as Petitioner's Exhibit One and ask if you can identify that as a picture that you took inside of Donnie's house.

A. Yes, it is.

Q. And is it a fair and accurate representation of the conditions in his house at the time that you were dating him?

A. Yes.

MR. MYERS: Your Honor, we would offer Petitioner's Exhibit Number One into Evidence.

MR. MOORE: I don't have any objection to this.

THE COURT: Show it to the other attorneys, please.

[54] MR. MYERS: (Indicating)

MR. SCHULZ: I have no objection, your Honor.

MR. BROWN: I have no objection.

THE COURT: Petitioner's One will be admitted.

(Thereupon, the instrument previously marked for identification as Petitioner's Exhibit Number One was received into evidence, and is attached

hereto.)

MR. MYERS: Q. Just one question in relation to that picture, R . Is that the way the house normally looked while you were dating him, and does it still look like that as far as you know?

THE WITNESS: A. As far as I know, yes.

Q. Okay. R , I just want to ask you a couple more questions. I want to ask you to tell the Court, as thoroughly as you can, why you think it would be in the best interest of your child to allow that child to be placed for adoption through Christian Homes of Abilene.

A. Well, it's because I -- Once a-gain, I've been assured by Nancy and the people that I was working with at the time that I spent in Christian Homes that my child would be placed in a home with two Christian parents who had to be married for

a certain amount of time and had to be making a certain amount of income and that have been waiting for a [55] child for a long time, and because I feel that, at sixteen, I am not capable of raising a child by myself. I feel I am too young. It's probably something that I could do, but it could lead just to -- It would be a child without a father, and my parents would probably have to help me out with it and help me raise the child, especially financially they would have to help me. And because marriage was not the answer. I wasn't ready to get married, and I didn't want to get married then. And because I'm adopted myself, and I feel very strongly that my child can be just as happy as I am right now in a home with two different parents who aren't her biological parents. And I have seen many, many other people with adopted children who are perfectly happy,

and the children are perfectly happy, even with brothers and sisters that do come from the natural family; they just fit right in. I have brothers and sisters that belong to my father and mother that I have right now. And I'm perfectly happy the way I am, and I feel that my child would be very happy and very blessed in a family with two parents that know Christ. And I think, just feel like Christian Homes is a good place to put my child and that they will care for that child in good foster care until the child -- they will be sure that the child gets a good set of parents, with a good home. I have total confidence in this.

MR. MYERS: Pass the witness, your Honor.

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[56] CROSS EXAMINATION

BY MR. SCHULZ:

Q. R , let me make sure, now. You are sixteen now?

A. Yes, I am.

Q. And your birthdate is in --

A. October 1.

Q. October. So you were -- Donald is twenty-five now?

A. Yes.

Q. Were you fourteen when you began this relationship with Donald?

A. Yes.

Q. Or thirteen?

A. I believe so. My calculations -- No, I guess I -- I am trying to think back. No, I would have been fourteen.

Q. He is eight or nine years older than you are?

A. Eight.

Q. Do you both live in or near York, Nebraska?

A. Yes. I live in town, and he lives

about two or three miles out of town, out in the country.

Q. About how populated is this area you are talking about?

A. Population is about eight thousand.

Q. Do you think it would be emotionally traumatic to a child to be raised in a community and know that a person there [57] was its mother and not live in that family-type environment? Would that be good for the child?

A. I don't think so, no.

Q. R , do you understand about love?

A. I don't know. Such a big thing.

Q. It's got a lot of parts to it, doesn't it?

A. That's right.

Q. And part of it is selfishness, isn't it?

A. Yes.

Q. And part of it is sacrificial.

A. Yes.

Q. And do you love your child any less because you have given it up for adoption?

A. No, I don't. I probably love it more.

MR. SCHULZ: That's all.

CROSS EXAMINATION

BY MR. BROWN:

Q. R , you heard the testimony earlier from Jo Griffin, a caseworker.

A. Yes.

Q. You heard her testify that before you signed the [58] mother's affidavit of relinquishment of parental rights that she fully explained that to you.

A. Yes, she did.

Q. Do you feel that she did fully

explain that affidavit of relinquishment of your parental rights to you?

A. Yes.

Q. Did you understand that by signing that you were naming Christian Homes of Abilene as the managing conservator of your child?

A. Yes, I do.

Q. Do you understand what a managing conservator is? Can you just tell the Court in your own words what that means to you?

A. Well, to me it's that they would have possession of the child.

Q. All right.

A. And that they, you know, take care of it.

Q. All right. And did she also explain to you to your satisfaction that this instrument, this affidavit of relinquishment of parental rights, was irrevocable?

A. Excuse me?

Q. In other words, that once you signed it that you were stating that you could not change your mind.

A. Yes.

Q. About placing -- about relinquishing or giving up [59] your parental rights.

A. Yes.

Q. In other words, it was irrevocable.

A. Yes.

Q. And do you feel that you fully understood all that?

A. Yes, I do.

Q. Was there any pressure put on you to sign it?

A. No, there wasn't.

Q. Do you feel that you voluntarily and understandingly and knowingly signed this affidavit of relinquishment of parental rights?

A. Yes, I do.

Q. All right. Now, in spite of all that -- Let's assume something for a moment. If in this case the Court were to determine that your parental rights were not going to be relinquished, were not going to be terminated, and understanding what you have already said about there simply not being any more chance of marriage, that that's just out the window --

A. Yes.

Q. If you were left in a situation, then, where you and Donald are still the unmarried parents of the child, with neither of your parental rights terminated, but you know you are not going to live together, you are not going to be married, what would you feel would be best for the child in that situation?

[60] A. Now, this is if I can't give it up for adoption?

Q. Yes.

Q. Yes.

A. Well, then, I would feel it was best to take the child myself and do the best I could to raise it.

Q. All right. Are you saying that in that situation you feel that it would be better for the child to be with you, to live with you, rather than with Donald?

A. Yes, I feel that way.

Q. All right. Would you say that your objections to him legitimating the child and being named managing conservator of the child, do they have more to do with him, with his capabilities personally, or with the fact that he would be a single father?

A. I think with his capabilities personally. Kind of both.

Q. All right. But is it still your position, then, that you want your parental rights in the child to be terminated?

A. Yes. If there is need, yes.

Q. And that you want the child to be placed with Christian Homes, for Christian Homes to be named managing conservator and to place the child with a suitable couple for adoption?

A. Yes.

Q. And that is what you think would be, and you believe [61] will be in the child's best interest?

A. Yes.

A. All right.

MR. BROWN: Pass the witness.

REDIRECT EXAMINATION

BY MR. MOORE:

Q. R , have you just testified that if the Court doesn't terminate either one of your rights that the child would be better off with you than with Donald?

A. Yes, I think so.

Q. You don't even want the child.

A. I never said that. I want the child, but I think she's better off at Christian Homes. I love the child and I would take her in if I had to. But not because I don't love her; I just feel that that's my mother duty.

Q. You just want the child to be with anybody but Donald?

A. No. I want her to be with somebody better than with Donald, and that's what Christian Homes has to offer.

Q. Petitioner's Exhibit Number One that you have offered [62] into evidence there, what does that demonstrate? Does that show -- Are you trying to show Donald there, his physical appearance? Are you trying to show the house's appearance?

A. Probably both.

Q. Both?

A. Yes.

Q. What had Donald been doing immediately before that picture was taken?

A. I don't remember. He'd probably been working.

Q. Had he just come in from work?

A. I don't remember.

Q. Are those his work boots and work clothes that he has got on in this picture?

A. Yes.

Q. Is that normally the way he worked?

A. Yes.

Q. So chances are he just came in from a hard day's work?

A. Yes.

Q. Does this picture show the house to be filthy? Do you consider that filthy?

A. Yes, I do.

Q. Now, you and Donald, before you even knew you were pregnant, had discussed marriage?

A. Yes.

[63] Q. After you found out you were pregnant, he asked you to marry him?

A. Yes.

Q. The papers that the Christian Homes sent him had in there that he had abandoned you?

A. Yes.

Q. And he refused to even consider that, didn't he?

A. Yes.

Q. As a matter of fact, he offered to pay the bill down here at Christian Homes, didn't he, to your parents?

A. I don't know if he ever did that or not. You'd have to ask my father that.

Q. All right. You don't know whether he did or not, whether he offered to pay all or part of your bill down here?

A. I'm not sure.

Q. He sent you money while you were

staying at Christian Homes?

A. Yes, he did.

Q. R , when did you decide that he's the kind of person he is, that you have testified he is today? Was it after you knew for sure that he wanted the child?

A. He's always been the person he's always been.

Q. In your letters, R , you refer to him as being a most wonderful man, handsome, a good man, a hard worker.

A. He still is. He has good qualities, too.

[64] Q. Before, you were just willing to overlook his bad qualities, when you had your relationship with him?

A. I wouldn't say that, because a lot of times I would talk to him about his smoking and his language.

Q. Okay. When you had the phone conversation with him that you have testi-

fied about, is that when you told him, "If you love me, you'll do what I want you to do"?

A. Which one do you mean?

Q. The last phone conversation that you testified to Mr. Myers about. When he was vacillating and you called him on the phone, when you said that he had written a letter, or his attorney had written a letter.

A. Oh. In the hospital, you mean?

Q. Yes, ma'am.

A. I might have said that, yes.

Q. "Donald, if you love me, you'll go along and do what I want you to do"?

A. Yes, but -- I think you're twisting around how I meant that.

Q. Has your family discussed moving from York, moving from Nebraska?

A. Have we discussed that?

Q. Yes, ma'am.

A. Well, yes, when we were still undecided exactly about what to do.

[65] Q. Talked about moving to Arizona, or where?

A. Yes, that would be one of the places.

Q. It's a good bet that you and your family won't even be in that part of the country?

A. That's right. We can move anywhere.

Q. Okay. And you have discussed it, and there is a good probability that you will move?

A. We're not thinking about it any move, no.

MR. MOORE: I believe that's all.

RECROSS EXAMINATION

BY MR. MYERS:

Q. R ., how much did Donnie send

you when you were down here in Abilene in the home? Do you recall how much money he sent you?

A. Yes. He probably, all together, sent me -- He probably sent me about seventy dollars.

Q. Did his dad send you any money?

A. Yes, he did. He sent me forty dollars one time.

Q. R , really what you are saying is, all you want is what's in the best interest of the child, is that right?

[66] A. Right.

Q. And if you are not able to give the child up for adoption, you think the best thing for the child would be for you to raise it?

A. That's right.

MR. MYERS: Pass the witness.

THE COURT: Anybody have anything fur-

ther?

You may step down.

MR. MOORE: I will call Donald Kirkpatrick to the stand.

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[67] DONALD J. KIRKPATRICK,

having been duly sworn, testified on direct examination by Mr. Moore:

Q. State your full name, please.

A. Donald J. Kirkpatrick.

Q. Donald, speak up, now, so the judge can hear what you have got to say and the court reporter can take this down, all right? Where do you live?

A. In York, Nebraska.

Q. How old a man are you?

A. Twenty-five.

Q. And have you lived there all your life?

A. Yes.

Q. You live with your family up there?

A. Yes. Right now I do.

Q. All right. Your family consists of your mother and father, and there are seven children in your family; is that right?

A. Right.

Q. Seven children all raised right there in the home where your mother and father live?

A. Yes.

Q. All but you and two sisters have gone?

A. Yes.

Q. Are grown and gone; is that right?

[68] A. Yes.

Q. All right. What do you do up there for a living?

A. Farm with my dad.

Q. You and your dad farm about a section of Nebraska land up there?

A. Yes, farm ground.

Q. All right. Do you make a good living at it?

A. Yes.

Q. You and your father both?

A. Yes.

Q. All right. Are you all kind of partners in your --

A. Yes.

Q. -- this farming operation?

A. Yes.

Q. What are your plans for the future, Donald? Do you plan to be a farmer all your life?

A. Yes. Maybe a rancher; hope the day comes. Want some ranchland.

Q. All right. And your father kind of plans for you to take over the operation there, doesn't he?

A. My brother and I, yes. My oldest brother and I.

Q. Now, you have a house of your own

down the road from your parents house; is that right?

A. It is not my own. It is my aunt's house that lives out in Colorado.

[69] Q. All right. But you have lived down there for a time?

A. Yes.

Q. You are living, presently, with your mother and father.

A. Yes.

Q. Working there on the place. Is there any reason why you would have to stay there with your parents?

A. No.

Q. You could move down in that house, in your aunt's house, or anywhere else, for that matter?

A. Yes, if I wanted to.

Q. All right. Now, Donald, you have heard the testimony about the relationship that you had with R ..

A. Yes.

Q. You loved her very much; is that right?

A. Yes.

Q. Still do?

A. Yes, I do.

Q. Did you realize when you filed this petition to legitimate this child that it would destroy any relationship that you had at all with R .?

MR. MYERS: Objection, your Honor. He is leading his witness.

THE COURT: I will let him answer. Go ahead.

[70] MR. MOORE: Q. Explain to the judge the consequences to your relationship with R when you filed this petition to legitimate.

THE WITNESS: A. If I come to court to get custody, try and go to court and get custody of my daughter, that it would

all be over between R and I and there would be no chance of her and I ever getting married.

Q. And you knew that?

A. Yes.

Q. And that's exactly what happened, isn't it.

A. Yes.

Q. Have you had any contact with her since that last phone conversation in March, February or March?

A. No.

Q. Have you attempted to contact her, Donald?

A. No.

Q. Do you ever intend to try and contact her in any way, either by mail or phone or in person?

A. No.

Q. You realize that she has made up her mind that the relationship is over,

that it is dead?

A. Yes.

Q. Is there anything connected with an attempt to get R to marry you in getting this child?

A. No.

[71] Q. You knew that that would drive her off?

A. Yes.

Q. All right. If you had given up your rights to the child and refused to file a petition to legitimate, did you think at that time that you would have had a chance with R in the future?

A. Small chance, maybe.

Q. Okay. Do you love this child?

A. Yes.

Q. Do you feel a bond with it?

A. Yes.

Q. Now, how old are you?

A. Twenty-five.

Q. Do you understand that raising a child is a very serious responsibility?

A. Yes.

Q. Do you believe that you could fulfill your obligations to the child both morally and financially?

A. Yes.

Q. Now, you have got to work during the day?

A. Yes.

Q. How will you make arrangements to take care of the child when you have to be in the fields?

A. Probably -- Either my mom will probably look after my daughter, or my sister.

[72] Q. All right. Have you discussed this with both your mother and father and your sister?

A. Yes.

Q. Will you take care of the child at

night?

A. Yes.

Q. You understand that taking care of a child is a lot of work?

A. Yes, I do.

Q. Have you thought this thing out fully before you filed this petition?

A. Yes, I did.

Q. Are you financially able to care for a child and raise a child?

A. Yes. I feel I am.

Q. All right. Can you tell the Court how much money you paid income tax on, not in '80, but in '79?

A. I grossed out sixteen thousand dollars, and then I paid, laid out, had to pay -- it was either around twelve or thirteen hundred dollars to the government.

Q. All right. And you made more money in 1980?

A. Made a little bit less.

Q. All right. Now, Donald, did you want this child -- From the time you found out that she was pregnant, did you want this child?

A. Yes, I did.

[73] Q. When you found out, what did you tell R ?

A. I asked her if she wanted to get married. I wanted her to assure herself, because if she didn't want to, I didn't want her to.

Q. What did you tell her about the child?

A. I told her I loved the child and wanted -- want my daughter, too, but yet -- All I can say is I love my daughter and I want her, and she's blood, and I just can't see letting her go when I want to raise her myself.

Q. From the time that child was conceived, did R try to encourage you to give up any right or claim that you might have to the child?

A. Yes. You could say that.

Q. What would she tell you in that regard?

A. She said -- said if I didn't, she

would -- if I try and get custody of the child, it would be all over with between her and I.

Q. Did she ever tell you that if you loved her, if you loved R , that you would give up this child and do what she wanted to do?

A. Yes.

Q. You heard her testify about the phone conversation when she got the papers --

A. Yes.

Q. -- from the lawyer, the phone conversation with her, [74] with you?

A. Yes.

Q. Is that what she told you in that conversation?

A. Yes. What she said is true, what I said. And I also told her to tear up the papers, and -- But I called back Nancy myself, though, and asked her to send up the

papers.

Q. Is that because R had pleaded with you to do that?

A. Yes.

Q. Did you ever want to do anything to hurt R ?

A. No.

Q. And you knew when you tried to get this child that it was going to hurt her?

A. Yes, I did.

Q. Why would you do that, Donald? Why would you try to get the child when you knew it was going to hurt R and it was going to destroy any relationship that you could ever have with her?

A. Because I love my daughter, too. I couldn't let her go, too. I had to try and get her. She's my blood, and I just couldn't let her go. I want her. She's part of me, and I just got to have her.

Q. If the judge were to legitimate

the child and name you the managing conservator, would you ever go around F . or try to contact her, her or her family?

[75] A. No.

Q. Would you ever tell the child what its mother's name was?

A. Yes.

Q. The home where you live with your parents, if you continue to live there, is it filthy? Is it not fit to live in?

A. No.

Q. Your parents have raised seven children there?

A. I know. Excuse me. I'm sorry. Would you please restate it? I misunderstood.

Q. All right. Just listen to the question, Donald. Take you time.

A. Would you please repeat the question again?

Q. Is you home there, your parents' home, or the house that you have got down

the road that you have lived in some that you could go back and live in now, is it suitable for raising a child?

A. Yes.

Q. Whether you lived in your parents' home there or you lived at -- How far down the road is this home, this other house?

A. From my parents' house, it's a half mile -- Well, it's three-quarters of a mile east from where my parents live.

Q. All right. If you lived with your parents, or you [76] lived in the house half a mile down the road, is there any reason that you wouldn't have proper supervision for this child when you were working during the day, either by carrying the child to your mother's house or having your mother come to this house, or your sister?

A. Well, there's no reason why they wouldn't. She always would have proper care. My grandma down where the house is,

she lives right across the driveway from me. She's right down there, too. So I got -- I'd have someone to take care of her. If something happened up home there, my grandma's there, would be right there, and they'd all be able to take care of her.

Q. Does your grandmother live on a farm there?

A. Yes.

Q. Your father someday will inherit a part of that land, will he not?

A. Part of that, yes.

Q. In addition to the land he already owns?

A. Yes.

Q. And some day you will inherit a part of all of that; is that right?

A. Yes.

Q. And your child would be entitled to her rights as one of your children to part of that land?

A. Yes. I'd want her to have it.

[77] Q. You understand that if the Court legitimates this child that you have all of the duties and responsibilities that any parent owes a child under the law?

A. Yes, I do.

Q. And that is what you want?

A. Yes.

MR. MOORE: I will pass the witness.

CROSS EXAMINATION

BY MR. MYERS:

Q. Donnie, are you telling the Court this afternoon that if the Court decides to grant your petition, in other words allow the child to go back with you, that the child would be raised by not only you but by your parents and your sister and your grandmother and everybody else; is that correct?

A. No, I ain't saying that.

Q. Well, they would certainly share in the responsibilities, would they not?

A. I said if something happened, as far as my grandma, she'd be there to help.

Q. But your sister would have primary responsibility during the day, wouldn't she?

[78] A. Not always, because I've talked it over with my sister, and I said, "I don't want you to stay here just because

of my daughter." If she wants to move out, wants to go out in the evening on her own, I told her to go ahead and do that; I don't want her to stay there because of my daughter.

Q. So are you telling the Court, then, that whoever is around would be the one to take care of the child?

A. No.

Q. Well, do you have a definite plan as to how you would handle this situation?

A. Definite plan right now is for mom to look out for my daughter, and right now my sister's home, and she will help.

Q. Your mom and dad, then, would have the primary responsibility?

A. My dad works, and he farms out there, too, with me.

Q. How old are your mother and dad?

A. Mom's forty-nine, and my dad's fifty-four.

Q. Donnie, have you ever had any experience, yourself, in raising a child?

A. No.

Q. You have had none whatsoever; is that correct?

A. No.

Q. You don't even know what is involved in raising [79] a child from eight months, do you?

A. I can't -- I can't say no to that, because my brother's got an infant, too. He's just -- He's eight or nine months old, and I've taken care of him.

Q. But you have never had the responsibility of taking care of a child on a twenty-four hour basis, have you?

A. No, I have not.

Q. Donnie, after the time that the child was born, after the time that P went back to Nebraska -- It has been eight months since that child was born?

A. Yes.

Q. You have never made any attempt whatsoever to find out about the welfare of that child, have you?

A. Yes, I have, because I've called down and asked Mr. Moore.

Q. You asked Mr. Moore?

A. Yes.

Q. What did he know?

A. He told me everything was okay.

Q. Well, now, were you asking him about the condition of your child or your case?

A. The condition of my child.

Q. Well, has he seen the child since the child was born?

A. No, I have not.

[80] Q. No; has Mr. Moore seen the child?

A. I do not know that for sure. I cannot answer that question.

Q. Well, he never did tell you your child was all right, did he?

A. No.

Q. Well, did you ever try to contact your child through Christian Homes just to see if she was all right?

A. No, I did not.

Q. Not one time, did you? Now, you made some payments. Mr. Moore said something about you sending some payments down.

A. Right.

Q. Do you recall when you made those payments, or when you started making the payments?

A. Started February 14 or 20, somewhere around there, and after that it was around the first of the month.

Q. Okay. Now, these payments, you didn't start these payments until over a month after your child was born; is that correct?

A. That's correct.

Q. And isn't it true that Mr. Moore advised you to do that?

A. Yes.

Q. Okay. So that was his decision, to make those payments?

[81] A. Yes.

Q. And you just wanted to make those payments so it would make your case look a little bit better?

A. No, I did not.

Q. Did you really want that payment to be made for support?

A. Yes.

Q. Have you made any effort to see that that money was used for the child?

A. Sent it down to the court. On every one of the money orders, postal money orders, sent down here is "child support for Baby Girl S ."

Q. Okay. In your decision to pursue this matter in the manner that you are

pursuing it, Donnie, you have discussed this matter at great length with your parents, have you not?

A. Yes I have.

Q. And you have had long conversations with your father, I'm sure?

A. Yes.

Q. And he is pretty opinionated as to just what should be the proper thing to do in a situation like this, isn't he?

A. In my opinion, he is.

Q. He has some pretty strong feelings about people that get pregnant and they are not married, doesn't he?

[82] A. No, he does not have -- Excuse me; would you please restate that?

Q. Does your -- You have discussed this matter at length with you father, have you not, Donnie?

A. Concerning --

Q. Yes. About R and the action

that you are taking in this court.

A. Yes.

Q. And he has been a pretty strong influence in your decision to pursue this matter, hasn't he?

A. No.

Q. He has not tried to influence you at all? Is that your testimony?

A. No.

Q. Does he not have any concern about the responsibility of people that get pregnant, and doesn't he think that marriage is the best thing whether the child's best interests are concerned or not?

A. I cannot answer that question for my dad. He --

Q. But you have never discussed that with him; is that your testimony?

A. He feels that people ought to get married, you know, have a family, yes,

he does. He feels very strongly that way.

MR. MYERS: Pass the witness.

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[83] CROSS EXAMINATION

BY MR. SCHULZ:

Q. How far did you go in school, Don?

A. I graduated from high school and started in farming.

Q. Have you lived there in York all that time?

A. Yes.

Q. How did this affair or romance get started between you and R ?

A. Through my sister, I met R .

Q. Had you dated other girls?

A. Before her?

Q. Yes, sir.

A. I had met one other young lady that I had dated.

Q. Well, I believe R has said that she was in the eight [sic] grade, fourteen

years of age. Did you consider her kind of young?

A. Thought about it, yes.

Q. You have asked about the duties and responsibilities of a parent. Now, how about Baby Girl S when she's fourteen?

A. Excuse me, sir. Would you please repeat it?

Q. How about Baby Girl S when she's fourteen? What would your attitude be if someone seduced her?

MR. MOORE: Malcolm, I don't believe anybody has testified that this young lady was seduced. I think [84] it was a mutual situation.

MR. SCHULZ: All right. I will withdraw that question. I have no further questions.

CROSS EXAMINATION

BY MR. BROWN:

Q. Donald, you heard me ask this similar question to R awhile ago, and I will ask you, also. Assume just assume, that after we are through here in court and everything is decided that nobody's parental rights are terminated and that the child is not with Christian Homes any longer.

A. Yes.

Q. And that you and R are unmarried with no plans of marrying each other, really no possibility of marrying each other, and there is this baby daughter that, in that situation, under the law, would need to be staying on a permanent basis with one or the other of you. In that situation, what do you think would be in the child's best interest as to which one of you the child should be with?

A. Are you saying -- Which one isn't going to be right, isn't going to be how it should be put, because it [85] wouldn't be right; just by saying her or I won't give me the right answer.

Q. I am not trying to ask you any kind of trick question. Just --

A. Excuse me. I didn't

Q. Just what, in your opinion, would be best for the child? If you have a situation where the child has got to live with either you or R and you all are not going to be married or living together, would it be better in that situation for the child to live with P or would it be better for the child to live with you, in your opinion?

A. The way I feel about my child, myself, yes.

Q. All right. And, again, I am not asking what would be better -- And I want

make this clear; I am not asking what you think would be better for you --

A. I understand that.

Q. -- but what would be best for the child.

A. I understand that.

Q. And you understand that's really what is behind all of this?

A. Yes, I know. I understand that.

Q. Okay. And are you stating, then, that you believe that in that situation the child would be better off with you than with Rachel? Is that your testimony?

A. Yes. I love my daughter.

[86] MR. BROWN: I don't have any further questions.

REDIRECT EXAMINATION

BY MR. MOORE:

Q. Donald, did you offer to R .'s parents to pay the full cost of the home

here?

A. Yes, I did.

Q. Did they refuse you that?

A. Yes, they did.

Q. When they refused you that, did you offer to pay a part of the cost, half of the cost, or any part they would let you pay?

A. Yes, sir. Because they said that the people who adopted the child paid for R 's -- for the cost, R 's medical bills, they had to pay the room and board, and I said, "Can I pay part of that?" and they said no.

Q. Now, you sent her money while she was down here?

A. Yes.

Q. You offered to pay that. Are you willing now to pay the doctor and hospital bills, whatever they may be --

A. Yes.

[87] Q. -- so that you may have your child? Are you willing to pay any costs whatsoever that the Court deems that you should have to pay if he legitimates this child?

A. All the doctor bills and all that, yes.

Q. Okay. Now, did someone come to you, some welfare agency, come to your father's home?

A. No, they did not come to my father's home, they come down to the house where I was living, down there where my grandma lives.

Q. Who was that?

A. I cannot tell you the lady's name. She was from Seward. And we talked for about two hours, down to the house where I told her I'd been staying, where I used to live.

Q. Did she examine where you were

staying there, where you were living?

A. All we done was come in the house, talked; told her why I wasn't living down here.

Q. Well, she was in your home, though?

A. In the house where I was staying, but not up at my folk's home. It was down there in that little house where I was living, and we just went in on the couch and sat down and talked for about two hours.

Q. And was this lady from some social agency up there in that state?

A. Yes. She was from Seward. I cannot remember her [88] name. I've got the card in my thing there, but I'd have to find it. But I cannot remember her name, what it was.

Q. Donald, do you believe that it would be in the best interest of your child

that, if we legitimate it, since you are the biological father, for you to raise the child than it be placed in a home with someone you don't know?

A. Yes. I feel -- with me.

Q. Would you have any objections, if the Court saw fit, if the child were legitimated, to name some agency in the state of Nebraska to monitor your situation, to come into your home, to check on you, if you have the child, any time, any place?

A. No, I do not. They're plumb welcome, any time.

Q. Would you have any objection to the Court or anyone else doing any kind of investigation on you, on your family, or your situation there in Nebraska?

A. I can't speak for my family, but as far as myself, they're plumb welcome to. I can just speak for myself. As far as my dad is concerned, it wouldn't make no dif-

ference to him, either, but any of the rest of the members of my family I can't speak for.

Q. Do you have any motivation for this action, Donald, other than a desire and love for this child and to raise it?

A. No other motivations.

MR. MOORE: I believe that is all.

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[89] MR. MYERS: I have no further questions.

RECROSS EXAMINATION

BY MR. SCHULZ:

Q. Donald, when did you get here to Abilene?

A. Got here yesterday at about 4:30, I suppose; somewhere around in there.

Q. Did you have a good night's sleep last night?

A. I don't know. I suppose so.

MR. SCHULZ: That's all

MR. MOORE: Step down.

THE COURT: Mr. Brown, do you have any more questions?

MR. BROWN: No.

THE COURT: You have got how many brothers and sisters, now?

THE WITNESS: A. I got three brothers -- three older brothers and three sisters, besides me.

THE COURT: Start with your oldest and give [90] me that one's name.

THE WITNESS: A. Mervyn Kirkpatrick.

THE COURT: Who?

THE WITNESS: A. Mervyn.

THE COURT: What does Mervyn do?

THE WITNESS: A. Drives an eighteen-wheeler over the road.

THE COURT: Where does he live?

THE WITNESS: A. He lives -- He keeps his business -- Well, he lives on the road, because he's always on the road, because he works for Salt Lake City out in Utah.

THE COURT: Does he have a home place now, or a house? Is he married or anything?

THE WITNESS: A. No, he is not married.

THE COURT: How old is he?

THE WITNESS: A. He is going to be thirty.

THE COURT: Going to be thirty?

THE WITNESS: A. Yes.

THE COURT: Okay. Who is next in line of the kids? Are you next in the age group?

THE WITNESS: A. No. Gary is.

THE COURT: What does Gary do?

THE WITNESS: A. He's in the Army.

THE COURT: Where is he stationed?

[91] THE WITNESS: A. In Germany.

THE COURT: How long has he been in the Army?

THE WITNESS: A. I can't say for sure, but two years after he got out of high school --

THE COURT: Is he a career man, going to be a career man?

THE WITNESS: A. I think he's planning on that.

THE COURT: What is his rank?

THE WITNESS: A. He's either E-5 or E-6; somewhere around in there.

THE COURT: Who is next in line?

THE WITNESS: A. Susan, my sister.

THE COURT: What does Susan do? Is she married? Where does she live?

THE WITNESS: A. Out in -- Out in Colorado.

THE COURT: Okay. And what -- does she work, or is she a housewife?

THE WITNESS: A. She works.

THE COURT: Who is next in line?

THE WITNESS: A. Myself.

THE COURT: All right. What does Susan do?

THE WITNESS: A. She works -- Well, she's married. She works -- He builds houses, and she works part-time, and here this December she's expecting.

[92] THE COURT: What kind of work does she do?

THE WITNESS: A. She works in a -- secretarial work.

THE COURT: Secretary?

THE WITNESS: A. Some kind of work like that.

THE COURT: After you, who is next in line?

THE WITNESS: A. Myself.

THE COURT: After you, then who?

THE WITNESS: A. Rex.

THE COURT: Rex?

THE WITNESS: A. Yes.

THE COURT: Okay. How old is Rex?

THE WITNESS: A. He's -- Twenty-three or -- I think he's twenty-three. I can't say for sure.

THE COURT: What does Rex do?

THE WITNESS: A. He's married, and he's got -- He works for Beaver Construction out of Geneva, Nebraska.

THE COURT: Is that near York?

THE WITNESS: A. Yes.

THE COURT: Who is next?

THE WITNESS: A. My sister, Diane.

THE COURT: And Diane is the one that is kind of at home most of the time now?

[93] THE WITNESS: A. Yes.

THE COURT: All right. How old is Diane?

THE WITNESS: A. She's twenty-one, I think. I can't say for sure.

THE COURT: Diane is not married?

THE WITNESS: A. No.

THE COURT: Okay. No young children in the house, then other than -- you and Diane are the only people?

THE WITNESS: A. Then I got another sister after her.

THE COURT: Okay. Who is next?

THE WITNESS: A. Lisa. And she is -- She's going to be in the eighth grade. Now, I can't -- She's either thirteen or fourteen years old.

THE COURT: Thirteen or fourteen?

THE WITNESS: A. Yes.

THE COURT: Okay. Does she date?

THE WITNESS: A. No. Not to my knowledge. I cannot say that for sure, but to my knowledge, I don't think she does, but --

THE COURT: Is she the one that's a friend of R 's.

THE WITNESS: A. That was Diane that was her friend, close friend.

THE COURT: Okay. That's all I have. I [94] just wanted to get a background on that. That is all I have.

MR. MOORE: Step down, Donald.

Judge, I would like to -- Has the Court examined the social study in the case? I would ask the Court to take that into consideration. I would like to offer it into evidence at this time to be made a part of the permanent record.

MR. MYERS: Your Honor, I would like to just say two things about the social study. Number one, I would like the Court to consider, if the Court does consider the social study, that the study was conducted solely from the standpoint of one interview with Mr. Kirkpatrick and it was not a study of, really, the overall condition of his life since it is limited only to him.

No other members of the family were consulted, no friends, relatives, or neighbors.

THE COURT: I think the report states that.

MR. MYERS: Also, I would like to point the Court's attention to the verification on the report. If the Court will notice, the portion of the social study which was done in Nebraska was conducted by a lady by the name of Rehor, but the report was sworn to and it was sworn to be true and correct and all facts true and correct by a Miss Fitzgerald here in Abilene, and I fail to see how Miss Fitzgerald could swear to something that was done in Nebraska.

THE COURT: Who requested that social study be done?

[95] MR. MOORE: Mr. Myers. He's the one that demanded and got the social study.

THE COURT: Okay. As I understand it, Elaine Fitzgerald's signature applies to the whole report including the investigation of your client; is that your understanding?

MR. MYERS: Well --

THE COURT: You don't understand her to just be certifying to the report out there, do you?

MR. MYERS: Well, if you will notice at the end of the report as to Christian Homes, she has sworn to that separately.

THE COURT: Yes.

MR. MYERS: And it looks to me that she is again just swearing to --

THE COURT: Okay. Well, I will take that into consideration. Mr. Schulz, do you have any objection to it being admiteed into evidence?

MR. SCHULZ: No, your Honor.

THE COURT: Mr. Brown, do you?

MR. BROWN: I don't, either.

THE COURT: Do you want to mark it as an exhibit?

MR. MOORE: Yes, sir. Your Honor, if the Court has some feeling that this is not adequate, I would request [96] time for me to get it --

THE COURT: I am satisfied with the social study. I don't think anything else is going to, you know, bring out any more than we can bring out on the stand.

MR. SCHULZ: Your Honor, I have some hesitancy about it being introduced into evidence. Now I have never -- I have never had that happen.

THE COURT: I think it is admissible.

MR. SCHULZ: I think the Court can consider it, but I think it takes it out of the secrecy realm once you make it a part of the evidence.

THE COURT: Mr. Brown, what do you

think about it?

MR. BROWN: Well, Judge, I am of the opinion that, in a proceeding of this nature, I think that anything -- that any additional information we can get to the Court and get in the record is advisable, and I am accordingly not objecting to it, and I would hope that the Court would admit it, would make it part of the record and consider it along with everything else here.

THE COURT: Mr. Myers, do you think there is any problem? There is not any problem on a hearsay basis or anything? Is that what you are speaking to, Mr. Schulz?

MR. SCHULZ: No.

THE COURT: You are just talking about the [97] advisability --

MR. SCHULZ: I think the statute says that the Court shall order a social study

in an adoption case, and I think the statute says the Court can consider it. I just have some hesitation about it being evidence as opposed to under the statutory authority of the Court to consider it.

MR. BROWN: Well, it's not an adoption case.

THE COURT: I think that -- I am going to allow it into evidence with the understanding -- Of course, I understand your objection; that goes to the weight of it, I think. And I am going to allow it into evidence. You know, for whatever purpose, if maybe nothing more than appeal purposes, if that is what becomes of this. Okay? It is admitted. Well, you had better get it marked, as --

MR. MOORE: Cross-Petitioner's Number One.

(Thereupon, the instrument was marked for identification as Cross-Petition-

er's Exhibit No. 1 and received into evidence.)

THE COURT: It is admitted.

MR. BROWN: Your Honor, let me ask one thing. Is the entire social study being admitted, including the study as to Christian Homes?

THE COURT: Yes.

MR. BROWN: We actually have two social studies there.

[98] THE COURT: Well, there is just one, but they were put together and stapled together.

MR. BROWN: We have two separate reports that are together as one social study, then; is that it?

THE COURT: Both reports are being admitted.

MR. BROWN: All right.

THE COURT: I will make this stipulation though: that I don't think that any

witness ought to be questioned about things in this directly from it, or it ought not to be revealed to anybody.

MR. SCHULZ: This was my hesitancy with it being part of the evidence, your Honor, in that, depending on how this court rules, that social study will be in other people's hands, and also, on appeal, will be reproduced and made part of the transcript here in the district clerk's office.

MR. MOORE: Evidence is sealed in cases every day and sent up to the appeals court. That can be sealed if the Court likes.

THE COURT: What I am going to do is order that all this be sealed.

MR. SCHULZ: That's my only hesitation.

THE COURT: Including the statement of facts. Whatever happens in these pro-

ceedings, they are going to be sealed, including this exhibit here. I am going to [99] admit it into evidence, but I am also going to rule that it -- no party can question other witnesses by showing them the document and say, you know, "What do you think about this," or anything like that, because it is supposed to be for the Court and not for the witnesses. Okay?

Let me see everybody up here at the bench for a minute.

(Thereupon, a discussion was had at the bench, not reported.)

THE COURT: We will be in recess for a few minutes, here.

THE COURT: All right. Call your next witness, please.

MR. MOORE: Mrs. Kirkpatrick.

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[100] HAZEL KIRKPATRICK,

having beein duly sworn, testified on direct examination by Mr. Moore:

Q. Would you state your full name for the records, please, ma'am?

A. Hazel Eveyln Kirkpatrick.

Q. Mrs. Kirkpatrick, would you speak up loudly enough, now, so the lady that is taking this down and all the lawyers here in the courtroom can hear what you have to say?

A. Yes, sir.

Q. And the judge.

A. Yes, sir.

Q. Hold old a lady are you, Mrs. Kirkpatrick?

A. I'm forty-nine.

Q. Where do you live?

A. I live at Route One, York, Nebraska.

Q. Have you lived there all your life, ma'am?

A. All my married life. I've lived in Nebraska all my life.

Q. What is your husband's name?

A. James Kirkpatrick, and he's a farmer.

Q. All right. How long have you and Mr. Kirkpatrick lived there where you are now?

A. Be thirty-one years in March.

[101] Q. How long have you been married?

A. Be thirty-one years in October.

Q. All right. And do you have children?

A. We have seven living children.

Q. All right. And were all of those children raised right there in that home?

A. Yes. And we're raising our youngest now.

Q. All right. Now, Donald Kirkpatrick here is one of those children; is that right?

A. That's right.

Q. He is still living in the home at this time?

A. Yes, he does.

Q. Now, Mrs. Kirkpatrick, you understand the nature of these proceedings?

A. Yes, I do.

Q. Prior to the discovery that R was pregnant, did R spend a good deal of time out there on your place?

A. Yes. She'd come and visit with my -- She was a friend of my daughters and with my son.

Q. Did she come out there often?

A. Yes, quite often.

Q. Mrs. Kirkpatrick, I want to ask you: What is the condition of your home? Is it a new home?

A. No.

Q. Old home?

[102] A. My home was built in -- my house

that I live in was built in 1905. It needs some repair work done, but my husband's a farmer, and we -- the way things are, today the way things are, you have to put your money back into your crops and into your equipment and things. We are working on the house, but it's slow work.

Q. Was that land passed on to your husband from his family?

A. No. My husband bought that line in 1950, about three or four months before we were married.

Q. Okay. Now, Mrs. Kirkpatrick, is your home dirty?

A. Well, maybe to some people it would be, but it's clean health-wise.

Q. All right. Other than the fact that it's old and you might like to live in a newer home, is it a suitable place -- You have raised seven kids there; it must be a suitable place to raise a family.

A. I feel it is. I have my other grandchild there quite often.

Q. What about Donald and his personal habits? Other than when he has been out working in the fields all day, does he keep himself clean and --

A. Yes.

Q. -- take care of himself?

A. Yes.

[103] Q. Do you know how to take care of an eight-month-old baby?

A. Yes.

Q. Would you be glad to impart any information or knowledge that you have in that regard to Donald?

A. Yes, I would.

Q. And help him in any way that he needs --

A. Yes.

Q. -- to raise this child?

A. Yes, I would.

Q. Before your first child was born, Mrs. Kirkpatrick, did you have any knowledge about how to raise a kid?

A. No.

Q. Do you think that is something that Donald could pick up on?

A. Yes, I think he could. And then he's been around with his nephew, and -- our other son's child, and he helped with that one quite often, and he's very good with him.

Q. Okay. Before R came to Abilene, and she was visiting in your home, did she ever show any dissatisfaction with your home or the way it appeared or being in your home? Did she appear to be uncomfortable there?

A. Not to my knowledge, she didn't

Q. What did she call you?

A. She called me Mom.

[104] Q. Did you love R ?

A. Yes, I did. We all did.

Q. Do you know that the relationship between R and Donald is forever gone?

A. Yes, I understand that.

Q. Do you believe that Donald has asked for this child in some kind of hope of a marital relationship between him and R ?

A. No, I don't believe so. It's not that way.

Q. Have you and your husband tried to influence Donald one way or the other in this matter?

A. No. We did not and we cannot. He has a mind of his own, and he knows what he wants in life. We -- With all of our children, we have been that way.

Q. Did Donald have some difficulty in making this decision?

A. Very much so.

Q. Do you know why, Mrs. Kirkpatrick?

A. It's a -- It would be a very tough decision to make, because it's his daughter. And it would be a very hard decision for anybody to make. For us, it's our grandchild, and we like to take care of our own. That't the way we always have been in our family.

Q. Does your family feel a very strong bond and obligation to the children?

[105] A. Yes. To all of them. That's the way my husband's family -- we are. We don't -- Sure, we get upset with them. That's normal with any parent. I think anybody here would have to admit that. There are days when you get upset with your children and you have problems, but there's always a way of settling it and finally getting it straightened out.

Q. Mrs. Kirkpatrick, do you believe that Donald is mature and responsible enough to care for a child and raise a child?

A. With help from his -- from myself and my daughter, Diane, yes, I think he could do it. There would be no problems concerning the child's care. We would see to it the child was taken care of, and it would have the religious upbringing, too.

Q. Do you feel that it would be in the best interest of this child --

A. Well, in my --

Q. -- that --

A. Go ahead.

Q. -- that Donald be named the legitimate father and that he be named the managing conservator to raise the child?

A. You mean in my opinion?

Q. Yes, ma'am.

[106] A. Yes. I think he is able to -- he is well capable of taking on that responsibility. He has taken on the responsibility of things at home. Ever since his father lost his hand and part of his arm, he has taken over a lot of the responsibility.

Q. Who does most of the work there on the farm?

A. Donald does. My husband helps him.

Q. Mrs. Kirkpatrick, do you think that a child would be better off in a family, being raised by people who are of its own blood, or by strangers?

A. I think a child is better off being raised by people of its own blood. That's the way I was brought up to be-

lieve.

Q. Does Donald have any medical problem?

A. Yes, he does. He has a form of epilepsy called grand mal. And the last couple of years there has been none; he has had no seizures. They have controlled it with medication. And the doctors said in time that probably he should be able to get clear off of the medication they have him on now.

MR. MOORE: I believe that is all the questions I have.

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[107] CROSS EXAMINATION

BY MR. MYERS:

Q. Mrs. Kirkpatrick, you said that you and your husband have raised seven children; is that correct?

A. We have seven living children, yes.

Q. And you and your husband were there all the time that they were growing up; they had a mother and a father all the time?

A. Right.

Q. And you believe, don't you, that that is a pretty good situation to be in?

A. Yes.

Q. To have a mother and a father?

A. Right.

Q. Wouldn't you say that that is the best situation to have, if a young child, an eight-month-old child, has a mother

and a father to care for him? Isn't that the way you would want your children to be raised?

A. Well, yes, but if it's not possible, we do what we can do. Now, I don't like to abandon our own. You know what I mean. I don't know if you understand what I mean. I consider the child my granddaughter, and she is.

Q. Have you ever seen your granddaughter?

A. No, but I still have feelings for that little baby.

Q. Have you ever tried to see her?

[108] A. No. We were told we couldn't, so --

Q. Have you ever made any inquiries as to your, quote, granddaughter's condition?

A. Yes, we have, but I haven't ever

-- we have never received no --

Q. Who have you inquired with?

A. Well, through my son, and I presume my husband through the attorney. He does all that.

Q. Well, you know, don't you, Mrs. Kirkpatrick, that the child is in the custody of Christian Homes of Abilene, do you not?

A. Yes, I know that.

Q. Why did you not try to contact Christian Homes of Abilene if you were concerned about the welfare of the child?

A. We went through our attorney.

Q. Did you request him to go through Christian Homes?

A. Well, I presume my husband did. I didn't do it, talk with the attorney.

Q. Mrs. Kirkpatrick, you testified a moment ago about your son's epileptic

condition.

A. Yes.

Q. Is he on any type of medication today that you know of?

A. Yes.

[109] Q. What type of medication is he on this afternoon?

A. Well, he takes two types of medication every day.

Q. He takes medication daily?

A. Yes.

Q. Mr. Schulz inquired a moment ago about him appearing tired. He appeared tired to me, also. Does he normally appear this way, Mrs. Kirkpatrick?

A. No. We have drove quite a long ways here in the last few days. And, you know, not sleeping in your own bed at night, you don't rest as well as you do in your own bed, and I think you will have

to agree with me there.

Q. Do you and Mr. Kirkpatrick attend church, Mrs. Kirkpatrick?

A. Yes. We belong to the Presbyterian Church there in York.

Q. And do you regularly attend that church?

A. Well, I work every other Sunday. Every other weekend I work in a rest home.

Q. Do you attend the church on the Sundays you are not working?

A. Not every Sunday, but when I have time -- I have other things at home, like where I work during the week; I kind of get caught up then.

Q. What about your husband? Is he a regular churchgoer?

[110] A. No, not really. I think I attend more than he does. But we do -- our children have always went to church when

they were younger, and then we let them decide what their religion -- what they want to do. We never told them. We wasn't brought up that way.

Q. Did most of your children decide, after you let them decide, to attend church?

A. Yes.

Q. Most of them did?

A. Our boys didn't attend church so much, but the girls did.

Q. Does Donnie not attend church?

A. Well, he goes for weddings and funerals. That way he attends church.

Q. But he doesn't go each Sunday?

A. No, not every Sunday.

Q. During the week?

A. No.

Q. You have seven children, Mrs. Kirkpatrick. Have any of them gone through

a divorce?

A. Yes. Two of them have.

Q. And are any of them presently in the process of divorce?

A. I don't know about the one boy. I couldn't tell you for sure, because he is in Germany in the Armed Forces. [111] And his wife and son are in Kansas. That's all I know, where they are at the moment.

Q. I see.

MR. MYERS: I pass the witness.

MR. SCHULZ: I have no questions.

MR. BROWN: No questions.

MR. MOORE: Step down, Mrs.

Kirkpatrick. Call Mr. Kirkpatrick.

THE COURT: May I ask her a question? Does your husband drink very much?

THE WITNESS: A. No more than most men would.

THE COURT: What does he drink? A beer or two in the afternoon, or three or four, or what?

THE WITNESS: A. Maybe three or four.

THE COURT: Mostly beer?

THE WITNESS: A. Yes.

THE COURT: Does he ever get drunk, real drunk, and raise Cain or anything?

THE WITNESS: A. Well, I don't -- How do you mean, sir?

THE COURT: Well, you would know better [112] than me. I'm not there, you know.

THE WITNESS: A. No, not really. There are times I get -- well, I get upset with him. But that's a wife's prerogative, isn't it?

THE COURT: When he drinks too much, you let him know, is what you are telling me?

THE WITNESS: A. Yes, I do.

THE COURT: All right. Where do you work and what are your hours?

THE WITNESS: A. Well, right now I'm working part-time, and I work seven -- quarter of seven to 3:15, and I work at our rest home at York, and I am certified to pass medicine and things like that, and that's my work.

THE COURT: Okay. Thank you.

MR. MOORE: Call Mr. Kirkpatrick.

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[113] JAMES KIRKPATRICK,

having been duly sworn, testified on direct examination by Mr. Moore:

Q. Would you state your full name for the judge and for the record, please, sir?

A. James M. Kirkpatrick.

Q. All right. Mr. Kirkpatrick, I will ask you to speak up, now, so everybody here can hear what you have to say, sir. How old a man are you?

A. Fifty-four.

Q. And have you lived in Nebraska all your life, Mr. Kirkpatrick?

A. York County, Nebraska.

Q. What have you done all your life?

A. Livestock and farming.

Q. Was your father before you a farmer?

A. Yes.

Q. Now, Mr. Kirkpatrick, is Donald here your son?

A. Right.

Q. You and your wife have seven children; is that right?

A. Yes.

Q. The lady that just testified here.

A. I beg your pardon?

Q. The lady that just preceded you on the stand there, [114] that's your wife; is that right?

A. Right.

Q. All right. Now, what does Donald do in Nebraska?

A. Oh, it's mainly livestock and farming.

Q. Are he and you partners --

A. Uh-huh.

Q. -- in working your place up there?

A. Right.

Q. All right. You own some land?

A. Yes.

Q. And then you lease some land from other people?

A. That's correct.

Q. And raise corn and livestock. All right. Who does most of the work up there, Mr. Kirkpatrick?

A. That's very obvious. He does.

Q. All right. How did you lose your hand?

A. Field cutter.

Q. On the farm?

A. (Indicating)

THE COURT: You need to answer up when -- You need to speak verbally. Answer yes or no when he asks a question, because she is taking it down, and she can't put down a nod of the head, okay?

Q. Mr. Kirkpatrick, you know that your son has filed a petition in this court requesting that the Court legitimate [115] the child that was conceived between he and R S ; you know that?

A. I know that.

Q. Sir, have you done anything to influence Donald's decision about what he should do in this matter?

A. I don't think I influenced his decision. I told him I would back him up financially.

Q. With whatever he decided?

A. (Indicating)

THE COURT: Was that yes or no?

Q. Speak up. Mr. Kirkpatrick, you have to speak out audibly.

A. Yes.

Q. She can't take the nod of your

head, this lady over here can't.

A. I'm sorry, your Honor.

THE COURT: That's fine. I understand. Go ahead.

Q. Now, Mr. Kirkpatrick, do you believe that Donald is mature and responsible enough to care for and raise a child?

A. I'm positive.

Q. Is he able, financially, to provide for all the child's needs?

A. Yes.

Q. All right. Do you and he split your earning there [116] on the farm?

A. Yes.

A. Okay. Mr. Kirkpatrick, do you believe it would be in the best interest of this child if Donald were named the managing conservator and had custody of the child and were allowed to raise it,

rather than terminating everybody's rights and placing the child in a home to be raised by some strangers?

A. Well, I feel that anybody ought to be entitled to their own flesh and blood.

Q. Do you feel a very strong obligation to your children, Mr. Kirkpatrick, to your children that you have raised?

A. I've backed them up up to date. I feel very strongly that way.

Q. All right. Mr. Kirkpatrick, somebody has mentioned during the hearing that you maybe throw down a beer or two.

A. That is correct, too.

Q. Do you have a drinking problem, sir?

A. I don't think so.

Q. Do you get drunk every day?

A. Can't afford it.

Q. Does it interfere with your work?

Do you work every day?

A. What I am able, yes. I work every day.

[117] Q. And when you say when you are able, are you referring to your arm?

A. Yes.

Q. Will you help Donald in any way that is necessary to raise this child?

A. Yes.

Q. Both information and teaching him how to raise children, help him financially, do whatever is necessary?

A. Yes.

MR. MOORE: I will pass the witness.

CROSS EXAMINATION

BY MR. MEYERS:

Q. Mr. Kirkpatrick, you feel pretty strongly, do you not, that whenever two people become pregnant, or the woman becomes pregnant, that they should be married; is that correct?

A. Yes, I do.

Q. And if they are not married, they should take whatever steps are necessary to become married?

A. I felt that way, yes.

Q. Do you feel that way now?

[118] A. I guess I would have to answer that if both parties were not willing, that was up to them.

Q. Okay. Do you feel that they should be married, that the best thing that could happen would be for them to marry and take care of that child, wheth-

er or not that would really be in the best interst of that child?

A. Would you rephrase that question?

Q. Do you feel that two people should become married and keep that child whether or not it would actually be in the best interest of that child to do so?

A. That's a very hard question to answer. I don't know the answer to that one.

Q. Well, you are asking, or at least your son is asking the court today to allow him to take the child with him because that would be in its best interest, even though R and he are not going to get married. So if you could, would you just tell the Court why you think that would be in the best interest of this eight-month-old child.

A. Well, in my viewpoint, one party did not seem to want the child, and he does.

Q. Go ahead.

A. That's how I feel.

Q. That's the only reason; is that correct?

A. Right.

Q. What if you knew that the other person loved the [119] child as much if nor more than Donald does, if he does? Would that influence your answer?

A. Well, I am just a layman, but I would think there, if you was considering giving away a child, that possibly you weren't showing the child's best interests.

Q. Could you elaborate on that a little bit?

A. I don't know how I could.

Q. Well, do you agree that sometimes you have to love someone an awful lot to let that person go?

A. No, I would not.

Q. You have never held back on your kids because you loved them? You have always kept them right there under your wing?

A. No. I helped them the best I could to get started on their own. That's been my main purpose in life.

MR. MEYERS: I pass the witness.

MR. SCHULZ: No questions.

MR. BROWN: I have no questions.

MR. MOORE: Would you like to ask him some questions, Judge?

THE COURT: No, I don't have any questions.

MR. MOORE: Step down, Mr. Kirkpatrick.

[120] THE COURT: Thank you.

MR. MOORE: Judge, I rest.

MR. MYERS: I will call Mrs. S .

D S ,

having been duly sworn, testified on direct examination by Mr. Myers:

Q. Will you state your name, please?

A. What did you say?

Q. Will you state your name, please?

A. D M S .

Q. Mrs. S , you are the mother of R S ; is that correct?

A. Yes.

Q. And you have come here from Nebraska to testify in this proceeding?

A. Yes.

Q. And you understand the nature of this proceeding; is that right?

A. Yes.

Q. Let me direct your attention back to October of 1980. Or, let's go back a little further than that, Mrs. [121] S . Let's go back to the time before you found out that R was pregnant with this child. Did you know -- How did you find out that R was dating, or was seeing, rather, Donnie Kirkpatrick?

A. I don't know what month it was. It was before Christmas. R came, upset, to me, because her girlfriend was going to tell me that she and Donnie were seeing each other, and so she told me first. I believe that's how it happened.

Q. All right. Prior to that time,

did you even know that she and Donnie were seeing each other?

A. I had no idea.

Q. Did you know that R had been going out to the Kirkpatrick ranch fairly frequently?

A. Yes.

Q. What did you think she was doing out there?

A. I thought she was visiting with Diane, the sister of Donnie. And she talked about Diane a lot. I was upset that she was out there so much, and I kept pestering her to bring Diane to our house for us to feed her once in a while, but she said that Diane felt uneasy at our house and that it just wouldn't work out that way.

Q. Mrs. S , after you found out that there was a possibility that R

was pregnant, did you take any steps to prevent R from seeing Donnie?

A. I tried. At Christmas -- Well, I think it was -- [122] It was around Christmas time. I don't know if it was still December, or January. We were visiting my mother. And R was very very upset and she asked if she could talk to me, if I would promise not to say anything to her dad, and I said yes. And she told me that she had been having sexual intercourse with Donnie at that time. And that was a pretty heavy thing to handle. I tried very very hard, then, to insist that she never be alone with him, and that she was going to see Diane, and that she would not take rides from Donnie in the car, things like that. I rode her awful hard, and I was on top of her an awful lot, and her daddy saw this. He -- I'm not very

good at hiding my body language; I can say the right things, but I don't act them out the same way. And he began to get on her a little bit, too, because he could see my anxiety. One day she said to me, "Mother, you're simply going to have to trust me." And I thought, yes, I need to trust her, and I did.

Q. Do you recall how much time lapsed between those events and when you finally found out that she was in fact pregnant?

A. That was in -- It was around Christmas time. I don't know before or after Christmas. And I found out she was pregnant the last of August, after we had just returned from the Netherlands. We had been in the Netherlands all summer. She had been pregnant while we were in

Holland, and [123] she never said a word.

Q. How did you find out that she was pregnant?

A. She had gone to Kansas to visit a girl who had formerly lived with us. This had been an unwed mother, and she wanted to go to college, and she wasn't allowed to live in the dorm, so we opened up our home for her, and after the semester was over, she went back to Kansas and had her baby. And R had gone down the summer before to help her out. And she asked to go down and see Donna again, and so we bought her a bus ticket and put her on the bus. And T and I were watching television in the evening, and she walked into the house with Donnie, and it was -- We were not expecting her home, and -- Well, when she walked in with Donnie, my heart immediately told

me what was wrong.

Q. Did you and your husband discuss this matter in detail or at length -- I'm sure you did -- with R , about the alternatives that she had?

A. Yes. When she and Donnie came in, they both had their heads hanging down pretty low. Donnie refused to ever sit down; he never did feel comfortable enough just to sit down on a chair that night; he stood the whole evening. They said they had come to pay their dues, and that meant that they would get married. And she was only fifteen, and I know something about teenage marriages, how fragile they are, especially having to get married, how much more difficult it is. It's [124] trying to get ahold onto two roles at once as a young adolescent and I just could not see that a fifteen-year-old girl could

get married and handle marriage and motherhood at the same time and go back -- keep going to school. She still had three years of high school yet to go. And knowing, also, she might not finish high school. And if there were a divorce in the future, or if she kept the child, they usually live on poverty level. It would mean all kinds of difficulties. We examined every kind of possibility there was. And, of course, there are no good solutions in a situation like this.

Q. Mrs. S , I'm sure that you and your husband discussed this over some period of time as to the options. Did you also discuss the options with Donnie?

A. Yes.

Q. What was his attitude during this period of time?

A. Ambivalent. He didn't know what to do. I couldn't blame him; he couldn't know what to do. He would be willing one moment to do whatever R wanted and whatever was best, and then he would turn around and say "I can't do this." We didn't feel it was our duty to push Donnie to make the decision. We wanted for him -- I mean, that was his own decision to make. But we made it clear that we didn't feel that marriage was an option. And R was ambivalent, also, going from one point to another, wanting to get married and then realizing how young she was and school and everything. And we just simply said, [125] "As your parents, at this point we cannot permit you to marry. If at majority age you still feel this way, that's your decision, but at this

point, we have a responsibility to you to make this decision for you that you cannot marry at this point."

Q. I believe you and your husband brought R to Abilene in August of 1980?

A. (No audible answer)

Q. Have you ever visited in the home of the Kirkpatricks? Did you visit in their home during the time that R was down here in Abilene?

A. Yes, we did.

Q. Did they invite you over to their house?

A. Yes, they invited us.

Q. What was the purpose of your visit? Was it to discuss the obvious? I'm sure it was.

A. Yes.

A. Did you know the Kirkpatricks

prior to all this happening?

A. I had met Hazel Kirkpatrick several times and had visited with her shortly. She had been in the hospital in Lincoln. I'm not sure now what she had. I think it was a flare-up of diabetes. But at any rate, I knew she was in the hospital, and I had gone to visit her in the hospital. And it was my first meeting with Mr. Kirkpatrick.

Q. Well, you obviously talked about what was going [126] to happen. Did the Kirkpatricks express any opinion one way or the other as to what would be the best thing for the child?

A. Yes. They -- They expressed that it would be best if R and Donnie were married, that that was the right thing to do.

Q. Did they say anything about the rights, or the best thing for the child?

A. No. It was the right thing to do. I was -- Let me think. There was one point that I got upset because Mr. Kirkpatrick mentioned that Donnie and R wouldn't have to worry about money, that he could take care of the money, and I got upset and raised my voice and said that money was not an important issue in this matter, but that the child was important, and the type of environment the child would have. And I still feel that way.

Q. Well, did you get the impression that the Kirkpatricks felt that it was the best interest of the child that was the most important thing?

A. No, I didn't get that impression. I got the impression that marriage, right or wrong, was the answer for this situa-

tion, that there were no alternatives; that if you get yourself into trouble, you get yourself out.

Q. You have known Donnie some since all this happened, and you have had some dealings with him. How would you characterize him emotionally?

[127] A. I would say he was unstable, because he -- He has difficulty making his own decisions. He's influenceable from all sides. If we talked to him, he wanted to do what R wanted to do; whatever she wanted was best. And it seemed that he would go home and he would talk to his father and he would turn around and say something else. And I have seen Donnie cry. Not that it's a crime to cry, but I think it's just from lack of knowing what to do on his own.

Q. When you arrived at their house back there in October of 1980, did Donnie meet you when you arrived at the house?

A. Yes. He met us in the yard.

Q. What kind of a state was he in at that time?

A. Highly emotional.

Q. Would you elaborate on that just a bit?

A. Well, he came to my husband and talked to my husband. I believe just before this he had called my husband and talked to him for at least an hour on the phone, and then we talked to him that night, and he talked to my husband, he approached my husband. He said, "I just want you to know that whatever R wants, that's what we'll do, but I want you to talk to my parents." And he was just -- I'm sure he was very very worried

about what would happen when we met in this kind of situation. He wasn't present while we discussed this.

Q. Mrs. S , from your knowledge of Donnie's [128] changing moods, would you say that this decision to pursue this matter in this court is Donnie's decision or his father's decision?

A. It's my firm belief that it is his father's decision.

Q. Mrs. S , you and your husband I suppose chose Christian Homes to bring R to; is this correct?

A. That's correct.

Q. Why did you choose Christian Homes as opposed to any other place to take R ?

A. Because of their good track record. We -- We consulted with someone else about where -- what to do or where to go, a social worker, and, for us, he called

Denver and Lubbock and Abilene, and because of his knowledge that Abilene placed their children in homes that were stable and spiritual, we chose Abilene instead of the other places.

Q. Do you have any reason to believe that Christian Homes would not place the child in a suitable home, one that would be in the child's best interest?

A. No, I don't.

Q. When R came down to the maternity home here in Abilene, did you begin to see a change in her attitude, her outlook on life?

A. Yes, we did. Of course, she was put into a public school. I understand that in Abilene all of the pregnant [129] girls go to one school, and not just those from Christian Homes, but all the pregnant girls. And she saw other girls who were pregnant, and she saw some of them who had

gotten married because they were pregnant. She saw all the problems. She talked to us over the phone about how some of them were having trouble with their in-laws and living with other family, and it -- It really opened her eyes up that adolescents make poor mothers. I mean, it's just not a time for motherhood.

Q. Do you feel that R fully understands the important decision that she has made in this case?

A. Oh, yes, I do.

Q. And do you feel that the decision that she has made is in the best interest of the child?

A. Yes, I do.

Q. Could you tell the Court why you feel that way?

A. I feel that a child needs two parents who love it, accept it, and will care for it, and that the home should be

stable emotionally, and that the parents have the ability to give the child the stability it needs to grow and to mature emotionally, spiritually, and mentally, and to provide for its physical needs. I do not necessarily think that wealth is a prerequisite for a good homelife. If the income is adequate, that's enough. And R L is adopted, and I feel that we have done the best we could with her, and knowing our attitude toward adoption and our attitude toward R -- [130] She's as dear to me as my blood children.

Q. You love R just as much as your other children, do you not?

A. She's been a jewel in our lives, and I wouldn't -- In spite of all this trouble, she's very dear. I know that adoptive parents can do a good job and love and accept a child.

Q Mrs. S , of course, the most

important thing that the Court has to determine in this hearing is what is in the best interest of this child. Do you have an opinion as to whether or not it would be or would not be in the best interest of the child to allow Donnie to establish a parent-child relationship with the child and to allow him to take this child home with him? Do you have any feelings about that?

A. I have very strong feelings. I do not feel he is capable of fathering this child. I know that the burden will fall upon his mother and father, and I do not feel that the situation they live in is good for this child. This child is also my grandchild. I don't want it growing up in that kind of situation. The house looks like it is an abandoned home that -- The floors are -- are dirty. I'm not saying they are bad people. I just don't think they should have this child. I want my

grandchild to have the best possible home that she can have. And I don't believe they could adequately give the child the emotional and mental support and the stability it needs.

[131] MR. MYERS: I pass the witness, your Honor.

MR. SCHULZ: I have no questions, your Honor.

CROSS EXAMINATION

BY MR. BROWN:

Q. Mrs. S , when the decision was made to place the child for adoption --

A. Yes.

Q. Whose decision was that?

A. That was R 's decision. The day she -- She wrote quite candidly to us. And she waivered, of course, in her

decisions. And my husband and I had discussed it, and we decided that we didn't know what kind of guilt our daughter could live with, the guilt of giving up the child and never having it again or the guilt of bringing it home and facing all of the different problems that that would bring, and so we decided that it was her decision to decide what kind of guilt she could bear. And when she called home and the baby had been born, we said, "Whatever you do, we are behind you and we support you."

[132]Q. All right. So it was her decision, then?

A. Yes.

MR. BROWN: I will pass the witness.

CROSS EXAMINATION

BY MR. MOORE:

Q. Mrs. S , this child is no blood

relation to you at all?

A. No.

Q. You said you don't think the Kirkpatricks are bad people. Is that right?

A. That's right.

Q. Do you know what their situation is out there, other than going out there and sitting down in their home one time?

A. I know from my daughter's conversations with me what they are like.

Q. Did you know that your daughter had spent a year and a half out there, Mrs. S ?

A. Yes. Yes, I did, and I've looked back on that quite a bit, and I, at the time -- When I was thirteen years old [133] my parents moved to a new town, and it was the happiest year of my life, and I hardly spent any time at home; I spent it with my friends in their homes. And I thought this was the stage she was going through. Plus,

we had just returned from living overseas for --

Q. Did you know where she was?

A. Yes. Well, I thought -- I thought she was at the Kirkpatricks', yes.

Q. You knew she was at the Kirkpatricks'?

A. Yes.

Q. Did you ever consider going out there and -- Obviously, from things you had heard in the community, these were not people that you would be alarmed about your daughter visiting.

A. No.

Q. All right. You had heard things about the Kirkpatricks, and --

A. I had heard nothing about the Kirkpatricks.

Q. You had heard nothing about them?

A. Except from her.

Q. And you let your daughter go out

there and you didn't even take the time to go out there and see what kind of people they were, where they lived and what they were doing, and what kind of people they were?

A. I had met Hazel, the mother, and I had met Diane, [134] the daughter.

Q. So you knew what kind of people they were?

A. I knew what Diane was like. I knew Diane was having problems. R spent quite a bit of time counseling her over the phone. But you must understand that we had just come back from overseas, were going through culture shock; reverse culture shock for us, culture shock for her. And it was very very difficult for our children to find any kind of -- I can't think of the English word. It means something to hold onto tightly, that would give stability and a feeling of acceptance. I

don't believe you understand the alienation that we were feeling as a family, but especially our children were feeling, an alienation from so many different things in this country. And R was searching desperately for a type of situation that was -- that had been present in Holland, and a very very close friendship like exists in Holland that does not exist in this country.

Q. Well, I understand all that, but you --

A. But that is why I allowed her to do this, because she needed to find something, and I was trying to help her find that.

Q. You at least made a determination that that was a safe place for her to go, in your own mind?

A. Yes, I had.

Q. For the year and a half?

[135]A. Yes. I had no idea that Donnie -- Because of his age -- I had met Donnie. I had no idea that a young man that age would be interested in a fourteen-year-old girl. It never entered my mind.

Q. Of course, sometime in the fall your daughter told you that.

A. Yes, she did.

Q. She told you that she was having a sexual relationship.

A. She did not tell me she was having a sexual relationship in the fall. She told me in December, at Christmas time. And if she had --

Q. Did you forbid her to go out there at that time?

A. Yes.

Q. You forbade her to go?

A. No, I did not forbid her to go.

Q. Did you tell her that she could not see Don again at that time?

A. In November?

Q. Yes, ma'am.

A. If it was in November, before Christmas -- No, I just warned her and talked with her personally about it.

Q. You didn't tell her she couldn't see him?

A. No. Because, you see, I was not given the impression that there was anything really wrong going on between her and [135] Donnie at that time. If she did, I'd have --

Q. Now, I am talking about the time that she told you she thought she was pregnant.

A. Oh, you mean in December?

Q. Yes, ma'am. Did you forbid her at that time to see Donnie?

A. I told her if she saw him she had to be in the presence of someone else at all times.

Q. So you didn't keep her from going back out to the Kirkpatricks'?

A. No, and it was a mistake on my part.

Q. You didn't even forbid her to be around Don, did you?

A. I forbade her to be around Donnie alone.

Q. Did you know that Donnie was bringing her home and letting her out in front of your house?

A. At that time -- From that time, as I recall, only Hazel brought her, or Diane. Before that time I know Donnie brought her home, but after that -- Because I watched.

Q. So if he says and she says that he was bringing her home, you just didn't see it?

A. That's true. Because as far as I'm aware, Hazel brought her home. Hazel

picked her up, or Diané, after that point.

Q. You said that Donnie was very influenceable. Did [136] you know that R was telling him that he must sign these papers if he loved her, if he truly loved her and didn't want to hurt her that he must sign these papers and give up any rights that he had?

A. What do you mean by that?

Q. Just that.

A. She said that to him?

Q. Yes. Did you know that?

A. I don't know that I would know it in just those words.

Q. She never told you that?

A. I can't say that she said it in just those words. Now, let me think.

Q. If Donnie cared very deeply for your daughter, if he loved her and she was pleading with him to give up the child,

give up any rights --

A. Yes.

Q. -- and telling him if he really loved her that's what he would do, if he cared about her, if he cared about the child, he would give up any rights that he had, would that explain why he may have had a hard time making a decision in this matter?

A. If he is influenceable, he is influenceable from two sides.

Q. That wasn't what I asked you, Mrs. S .

[138]A. I'm sure that R L feels that way.

Q. And she told him that?

A. Am I supposed to say what she says?

Q. No, ma'am. You are not -- All I want you to do is answer my questions.

MR. MYERS: Your Honor, we will object to him badgering the witness

in this manner. He is trying to --

MR. MOORE: Can I get an answer to my questions?

THE COURT: Let me ask you, if you will, to do this: just answer his questions outright, just as quickly as you can, and move along, okay?

MR. MOORE: Preferably with a yes or no.

THE COURT: Answer the best you can, okay? Thank you.

MR. MOORE: Q. Mrs. S , would it have been difficult for Donnie to have made a decision if your daughter was telling him, "If you love me, Donnie, you'll do what I tell you do do; you will give up your rights to this child if you care about me"?

THE WITNESS: A. I guess I will have to say yes, it would be difficult, especially if he had a father who was

telling him just the opposite.

MR. MOORE: That is all the questions I have.

[139] MR. MYERS: I just have two very short questions, your Honor.

REDIRECT EXAMINATION

BY MR. MYERS:

Q. Mrs. S , let me show you what has been marked as Petitioner's Exhibit Number One, and let me direct your attention back to October of 1980. If you would, look at Petitioner's Exhibit Number One. Would you tell the Court whether or not that substantially reppresents the way the interior of that house looked to be the evening that you and Mr. S went over there?

A. Yes, except for -- The table was cleared.

Q. Is that the only difference?

A Yes.

MR. MYERS: That is all I have, your Honor.

MR. SCHULZ: I have no questions, your Honor.

MR. BROWN: I have no questions.

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[140] THE COURT: You may step down. Thank you. Well, let me ask you a question or two. Do you work? Are you employed?

THE WITNESS: A. I'm -- At the moment, I just got a job as a half-time instructor at York College, and I'm a full-time student.

THE COURT: What do you instruct in?

THE WITNESS: A. Child development, personal development, and dynamics of home economics.

THE COURT: What does your

husband do?

THE WITNESS: A. He is head of the Bible department at York College.

THE COURT: And you all have been overseas in missionary work or something?

THE WITNESS: A. Yes, sir.

THE COURT: Okay. Thank you. That's -- Let me see. I may have some more notes here. And what religion are you, if I may ask? I assume you are --

THE WITNESS: A. Church of Christ.

THE COURT: Church of Christ? And you were in the Netherlands on missionary work?

THE WITNESS: A. Yes.

THE COURT: Is that what you were doing? How long did you all stay there?

THE WITNESS: A. Fourteen years.

[141] THE COURT: And you all just kind of moved back, joined the United States, right?

THE WITNESS: A. That's right.

THE COURT: I imagine that was a shock. Thank you for coming down.

Go ahead.

MR. MYERS: I will call Mr. S , please.

T S ,

having been duly sworn, testified on direct examination by Mr. Myers:

Q. Would you state your name, please?

A. T S .

Q. And Mr. S , how are you employed?

A. I am a professor at York College in

York, Nebraska.

Q. And what do you teach at York College?

A. Biblical subjects and history.

Q. Mr. S , I believe you are the father of R L S , who is one of the parties to this action; is that correct?

A. Yes, sir. I am the adoptive father.

[142]

Q. And you have come here to testify in this proceeding and to give some of your thoughts and opinions; is that correct?

A. Yes, sir.

Q. Mr. S , let me direct your attention back to August of 1980. I believe it was then that you first became aware that R was pregnant; is that correct?

A. Yes, sir.

Q. Would you relate to the Court how you learned of this?

A. Well, that was simply made known to

us by both R and Donnie. This particular evening they came to us and indicated her condition, and simply stated that she was carrying a child.

Q. Did you know anything about Donnie Kirkpatrick prior to this?

A. Very little.

Q. Did you know that R had been seeing Donnie?

A. Yes. I knew that R had been seeing Donnie. I thought, personally, that it was just a matter of a friendly relationship because of her interest in the family and especially in Diane, a sister of Donnie.

Q. But you knew that she and Diane were very close friends, did you not?

A. Yes, sir. [143]

Q. After you and Mrs. S learned of the pregnancy, I'm sure you had occasion to counsel with your daughter and possibly with Donnie concerning the options that

you had. Would that be a correct statement?

A. Yes, sir.

Q. Would you relate to me the options that you and your wife and R con-sidered concerning her pregnancy?

A. Well, we discounted the option of abortion. We considered the possibility of marriage and discounted that possibility because of what we considered the high risk of a possible future divorce and the consequences for both the child and for these two young people. We also considered the possibility of single parentage, either in the young man's case or her case, and weighed the risks that are involved in that and the consequences for the single parent and for the child involved. And we also looked at the alternative or option of adoption into a Christian family where the baby would have two parents.

Q. In the decision-making process which was involved, was Donnie involved in any way?

A. Only by way of discussion of the options and alternatives that we were considering.

Q. Did he indicate to you feelings one way or the other as to what would be the best alternative?

A. Well, he felt that the best thing to do, as I [144] recall, would be to give consent for marriage.

Q. Did he indicate to you any feeling of great love and concern for the welfare of the child, or was his emphasis primarily upon marriage?

A. Well, as I recall, the primary emphasis in our discussions together was on the matter of marriage, that it was the proper thing to do in this instance to resolve the matter by marriage.

Q. Has he ever indicated to you in any way a feeling that in the event that he and R would not be able to be married that he would still want to take the child and love the child and care for the child just as though it was his child?

A. Well, it seemed to me from our discussions that the major interest that he expressed was in marriage with R , and that the child would be, in a sense, a binding factor in a marriage, and that he felt that marriage was the right thing to do.

Q. Mr. S , do you feel that that is at least partially a motive of the proceedings that we are having here this afternoon?

A. Well, in my judgment it is, yes.

Q. I believe you and Mrs. S brought R down here to Abilene in August of 1980. While she was here, did you and

your wife have an occasion to go out to the Kirkpatricks'[145] home and discuss this matter with them?

A. Yes, we did.

Q. Would you relate to the Court the nature of the discussion that you and Mr. and Mrs. Kirkpatrick and Mrs. S had?

A. Well, we -- In the beginning, we simply discussed the normal things like the weather and how things were going. And then when our discussion turned to the matter at hand, the Kirkpatricks, especially Mr. Kirkpatrick, felt that the proper thing to do in this situation was for these two young people to get married, that it was their responsibility, that the fact that a child was going to be born was their responsibility and that the way to deal with that responsibility was for them to enter into marriage. He also in-

dicated that it was not a matter of money and we indicated in response that we were not concerned about that aspect of the situation as much as were about the welfare of R and the child that was going to be born into the world, and that the matter of marriage was not a primary consideration -- or that the matter of money was not a primary consideration, and we felt that a good Christian home for this child was our primary consideration. And we -- I received the strong impression that Mr. Kirkpatrick, especially, feels that the situation needed to be righted by the acceptance of responsibility on the part of these two young people and that the right thing to do was to [146] be married.

Q. Did you get the impression that Mr. Kirkpatrick felt that it should be marriage at any cost, even if that cost sacrifices the welfare of the child?

A. Yes, I did. That was the primary motivation from his point of view, that the only thing to do was for them to get married.

Q. Did he express to you any opinions concerning adoption, how he felt about adoption?

A. Well, he felt that that would not be the right thing to do. When we expressed that this was our point of view, he was not in agreement.

Q. Well, did he -- Do you recall him saying anything to the effect that, None of my genes are floating around in someone else's -- with someone else's name, or something?

A. Yes, sir. He stated that. And I concluded from that that he meant that in a situation like this where a pregnancy had occurred out of wedlock that the responsibility was a matter of the

two people involved and that responsibility required their getting married.

Q. Let me just ask you one specific item, item, Mr. S . Were you present when some papers came to your house for Donnie to sign? I believe R was there, also. Some forms, things like that. Do you recall that?

A. Yes, sir.[147]

Q. Could you relate that incident to the Court?

A. Well, with regard to the signing of these papers, it appeared to me, as one of the parties present, that it was necessary for R to take the initiative in indicating what the nature of the papers were, how they should be filled out, what the consequences of the signing of the papers would be, and so on, and that Donnie was uncertain in what needed to be done in this case, and

that she was, in a sense, the guiding person or the leading person in explaining the nature of the papers and the consequences that were involved.

Q. So she had to explain to him how to fill out some forms?

A. Yes, sir.

Q. Do you recall what that form was? Was it a complicated form?

A. I don't recall exactly the nature and content of the form.

Q. Was it --

A. I couldn't be specific about it.

Q. Was it a general information form about family background, things like that?

A. I think it was, yes.

Q. Did you get the impression from that that Donnie was not too bright?

[148] A. Well, that's -- That's a difficult question to give an answer to. I just felt that, at that moment, at least, that he was dependent upon R to adequately, properly fill out the form.

Q. Mr. S , we are here today to determine two things. Ultimately, it is what is in the best interest of the child. But I would like to ask you, first of all: Do you have an opinion as to whether or not it would be in the best interest of this child to allow Christian Homes to place this child for adoption? Do you have an opinion as to that?

A. Yes. I do have a strong opinion that the child should be adopted through Christian Homes.

Q. Can you give the Court some background on the basis of your opinion? What do you base your thoughts on?

A. Well, when my wife and I dis-

cussed this together -- And she has access to a lot of family materials at the University of Nebraska. We talked, also, with family counselors. We felt at that time and feel now that the risks of divorce at her age, and a marriage at that age, are very high, and the consequences for the child under question at the moment could be very negative; other children could be born into that marriage and the consequences for them could also be negative. We also are familiar with studies on one-parent situations. And we simply came to the conclusion then and feel strongly now that the child in this instance would be in a much better [149] situation having two parents, being in a Christian home and having the advantages of those two parents, than in any of the alternatives.

Q. Well, let me ask you one other question, then. The converse of that would

be: Why would it not be in the best interests of the child to allow the child to go back with Donnie, to have Donnie named as the parent, and to have Donnie raise that child just as though it were his child?

A. Well, we know, on the basis of studies, once again, what we consider are the negative aspects of the one-parent situation. I personally feel that because of Donnie's physical handicap, the epileptic matter, that he is strongly dependent on his father, especially; on both of his parents. His father indicated to us in a discussion with him that evening that he needed to be concerned about when Donnie was involved in using farm machinery, if he was up on high places, that there was always that concern. And another matter that bothered me at that time and continues to do so is that Don had indicated

on at least four different times in our own home that even though his father had strongly suggested that there should be a marriage result from this situation that he would nevertheless abide by R 's decision with regard to what would happen to the child. And that was repeated on a number of occasions. And there seems, to me, at least, to be a certain amount of instability in there to continuously say[150] and promise one thing and then to make a contrary decision at the final moment. And if I, as a parent, or person, am going to put a precious thing into someone else's hands, I would like to feel that there is a stability there to make a firm decision and then to stay with it, and not to say one thing at particular moments and then to do something contrary in the final analysis.

Q. Mr. S , whose decision do you

feel it was to pursue this matter in the court today as Donnie is doing? Do you feel that that was his decision or do you feel like it was his father's?

A. Well, that's difficult for me to say. I feel that it was primarily a matter of his father's insistence, because Donnie had indicated to me personally and to our family in our home that this course of action would not be followed.

Q. Do you feel that he would not have pursued the matter had it not been for the insistence of his father?

A. Well, that is my feeling, because he had indicated to us that this would not take place.

Q. Mr. S , just a couple more questions. Are there any plans for you and the rest of your family to move from York back in Nebraska?

A. There are no definite plans at

this point.

Q. Have you and your wife discussed this matter with anyone?

[151] A. We have discussed the matter of what course of action we might have to take if that child were brought back into our community. That may necessitate a move for the welfare of the child as well as her welfare, as well as for Donnie's welfare.

Q. You don't believe that it would be a good situation to have that child growing up in a small community with the knowledge that its father is living down the street from it, do you?

A. I think it would be an impossible situation for her.

Q. Are you telling the Court that any decision concerning a move, then, would be based upon that feeling?

A. Yes, sir.

Q. Let me direct your attention back to October of 1980, Mr. S . And I will show you what has been marked as Petitioner's Exhibit Number One. I would like to ask you whether or not, on the evening that you and your wife went over to that house, did the house that you went into look substantially as that picture depicts?

A. Yes sir.

Q. Okay.

MR. MYERS: I pass the witness, your Honor.

MR. SCHULZ: No questions, your Honor.

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[152] MR. BROWN: No questions.

CROSS EXAMINATION

BY MR. MOORE:

Q. Mr. S , you didn't have any

influence upon K 's decision in this matter, did you?

A. What we did, sir, is to discuss with her the different alternatives as we were able to put them together with the research that my wife has done in family studies and with the information we had received from family counselors. And we talked together about the alternatives, and we told her that the final decision would be hers and that we would not only accept but stand behind her in whatever decision she finally made.

Q. Did you tell her that she could get married if she wanted to?

A. We told her we would not give her permission at that time to get married.

Q. So to that extent, at least, you did influence her decision?

A. Yes, sir. To that extent.

Q. Okay. She could make any choice

she wanted to [153] but to get married; "You accept any alternative you want except marriage, because that's out."

A. Well, I thought you meant with regard to the child, the final disposition of the child. Indeed, we did say to her that we would not give her permission, parental permission, to be married.

Q. Well, marriage would be a final disposition for the child.

A. Yes, sir. I see what you are saying.

Q. What would be the difference, Mr. S , in this situation, if she lived ten miles away than it would be if two people were married and had children and got a divorce and the children stayed with the father and the mother moved across town? What difference would that be?

A. For whom?

Q. For the children.

A. Well, it would mean that the children were not living with two parents under the same roof. They would have to know the reason why that was not the case. And it would seem to me that it would put a great deal of pressure on both the children and the two parties involved.

Q. But it would be no different than a divorce.

A. Well, it -- In one -- I think, if I am understanding what you are saying, that -- A divorce is a legal transaction that indicates a fixed relationship based on law, [154] and if you understand by the other relationship that this kind of legal transaction has not taken place, then it would seem to me that there is the matter of the legality and what that means to all parties involved.

Q. Mr. S . thousands of people in this country divorce every year. Is it

your opinion that a divorced single parent cannot be a good parent?

A. No, sir. It is not my opinion.

Q. Single, divorced parents do an excellent job, many of them have done an excellent job of raising children in this country, are doing so today; isn't that true?

A. I assume that it's true. I have not looked at the evidence of that.

Q. Have you known people that are divorced, Mr. S ? Have you even known anyone that was divorced?

A. Yes, I have known people who have.

Q. That have children?

A. Yes. In some cases I do. And the results of those are as negative as they are positive.

Q. You will agree, as a general proposition, that a divorced single

parent can be a very very fine parent?

A. Can be. That's true.

Q. All right.

MR. MOORE: That is all the questions I have.

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[155] REDIRECT EXAMINATION

BY MR. MYERS:

Q. Mr. S , a divorced single parent, of course, would have taken on the legal responsibility of rearing whatever child might be the subject of that marriage, had they not?

A. I would assume so. In the case of our own relationship to this young lady, we are adoptive parents, and we went through a definitive screening process, an investigative process, before we gained permission to adopt the child and to be accepted as parents in an adoptive situation, and so I would assume

that parentage is a matter of not simply conceiving children into the world but of having qualifications to be parents.

Q. Donnie Kirkpatrick has not taken on any of the responsibility of rearing this child, has he?

A. To my knowledge, no.

MR. MYERS: I will pass the witness.

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[156] RECROSS EXAMINATION

BY MR. MOORE:

Q. Mr. S , that is just exactly what this proceeding is about; Mr. Kirkpatrick is attempting here to establish the fact that he can accept the responsibility; isn't that true?

A. I assume that't true.

Q. He is asking this Court and this agency to let him be a parent and accept the moral and legal and financial responsibility for this child, isn't he?

A. I assume so, yes.

MR. MOORE: That is all I have.

MR. MYERS: I have nothing further, your Honor.

THE COURT: Okay. Do you rest?

MR. MYERS: No. I have one other witness.

THE COURT: Okay.

MR. MYERS: I will call Nancy Miller.

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[157] NANCY MILLER,

having been duly sworn, testified on direct examination by Mr. Myers:

Q. Would you state your name, please?

A. Nancy Miller.

Q. Nancy, how are you employed?

A. Executive Director of Christian Homes of Abilene.

Q. What formal training have you had, Nancy, your college and whatever graduate work that you may have had?

A. I have a bachelor's degree in education from A.C.U. I have a master's degree in psychology from Kansas State Teachers College.

Q. And what is your work experience since the time that you graduated from A.C.U.?

A. Following my graduation from

Abilene Christian, I taught school for three years in the elementary grades, and then went back for my graduate work, and following that was a school psychologist in Mason City, Iowa. Then I came to Wichita, Kansas, where I worked for five years as director of social services for Maude Carpenter Children's Home, then moved to Abilene to Christian Homes of Abilene as director of social services for two years, and for the last nine years have been executive director.

Q. Have you attended any workshops that would be beneficial in the type of work that you do?

[158] A. Yes. I attend workshops in child care and adoption quite often. I'm required -- I'm a licensed child care administrator, and I am required to have a certain number of hours of training each year to maintain that license.

Q. Are you a member of any special organizations or special committees?

A. Yes. I am a member of the Southwest Society of Executives of Homes for Children. I am a member of the Texas Association of Licensed Children's Services. I've been a member of -- I'm not right now, but I have been in the mental health association and served on the Citizens Against Crime committee here in Abilene.

Q. And have you been a speaker in any workshops, seminars or schools, Nancy?

A. Yes. I speak quite often at seminars and retreats and schools on the subjects of child care and adoption, and have been in the public schools for some in-service training with teachers; have conducted family -- have been director of family relationship seminars through our agency, and have spoken in a number of adoption workshops with other agencies.

Q. Nancy, what are the primary functions of Christian Homes of Abilene?

A. Our main three services are adoption, foster care, and maternity care for unwed parents.

Q. And yourhome is licensed by the State of Texas, [159] I believe, is that correct?

A. Yes. Our maternity home is licensed by the State Health Department. Our child placing program is licensed by the Department of Human Resources.

Q. And your licenses are current at this time; is that correct?

A. Yes, sir.

Q. Nancy, do you have any idea as to how many children Christian Homes has placed for adoption since the beginning of Christian Homes?

A. It's about 590 children.

Q. And do you have any idea how

many girls have been taken care of in the maternity care unit?

A. I believe it's about 485, 490; somewhere right in there.

Q. And the foster care, how many children have been cared for through the foster care facilities?

A. About 800.

Q. Nancy, through your association with Christian Homes of Abilene, have you become acquainted with R L S ?

A. Yes, I have.

Q. And is this R L who is seated by her attorney, Mr. Stan Brown?

A. Yes.

[160] Q. Have you become familiar with her desire to place her child with Christian Homes and to place that child for adoption?

A. Yes, I have.

Q. Have you had an opportunity to

discuss this matter with R concerning her desires in that matter?

A. Yes.

Q. And have you also had an opportunity to discuss the matter with Mr. Donnie Kirkpatrick?

A. Yes, I have.

Q. Would you relate to the Court the discussions that you have had with Mr. Kirkpatrick?

A. I only talked with him one time. He called me on the afternoon of January 13, I believe it was. It was on a Tuesday. It was the Tuesday after her baby was delivered on Sunday. He said that he had talked to R and he had called me to -- I don't remember exactly what he said the first sentence or two, if it was to talk about the papers or what he should to, but it was about his decision. He was having -- He was disturbed and upset. He said that

he had talked to R , and she -- he knew that -- No; he asked me if she was going to sign the papers, and I said yes, that she was going to sign the papers to place the baby for adoption because she felt that was the most appropriate thing to do for the baby, and he said he didn't know what he wanted [161] to do because he had said that he wanted to agree with R but now he didn't know if he should. He indicated to me that he was getting a lot of pressure from home about the decision. He asked me if I knew what it was to be told what his responsibility is since he conceived the child, and then he -- We talked about forty minutes, thirty or forty minutes that afternoon, and during that time he told me a couple of times that he would sign the papers, and then he would say, "No, I don't know if I want to or not." And he asked me if my conversation

with him would go against him in court, and he was -- he said he felt sure that I would tell the judge and it would hurt him if I did that. And he said it was very very hard for him. I told him that I knew it was, that it was always a difficult decision for a parent to make under these circumstances. He waivered quite a bit, vacillated back and forth in what he wanted to do. And he asked me if I thought if he signed the papers -- I mean, if he didn't sign the papers and he tried to get the baby, would R eventually come back to him. I told him I didn't feel she would, based on what she had said to us in recent weeks and what her feelings seemed to be at that time, but he would have to talk with her about that. And so then he said again that he cared -- he told me that he cared for R and that he cared about the baby, but he wanted to do the right

thing. So our conversation closed that afternoon on the telephone with his saying [162] that he thought he ought to sign the papers, and if we would get them ready and send them to him he would. But I forgot to say one thing. I mentioned to him that what -- He asked me what would be in the papers, and I told him, and I told him that one of the things that he needed to understand was the statement in there that said that he would have abandoned the mother and the baby, and that we realized that he cared about R and that he cared about the baby and he had shown an interest in her, but that that is the nearest terminology in the Texas Family Code that we can use in our relinquishments to be the closest to what this situation was.

Q. You are talking about a parental termination?

A. Yes.

Q. Obviously, of course, he is not a parent at this time, is he?

A. Right. But we -- Okay. But that's -- The papers that we send would have that in it.

Q. Did Donnie seem to vacillate back and forth about his position as to what to do from moment to moment?

A. Yes. Three of four times during that conversation he did.

Q. Has Christian Homes tentatively selected a family unit as an adoptive family in this case?

A. Yes, we have.

Q. Would you explain to the Court the procedure that [163] is gone about to make that determination?

A. Well, we -- Of course, the first would be making adoptive studies of the families that apply, the family homes, and we do an in-depth adoptive study on each

family that applies, which involves getting references and making personal contacts with them in the office and in their home.

Q. Approximately how many inquiries do you receive on a yearly basis?

A. On, between three hundred and three hundred twenty-five a year.

Q. After you receive that initial inquiry, what are the following steps that are taken?

A. Well, the first step taken is to send them a preliminary form to fill out and return to us, and if they are -- meet certain requirements that we have, like live in the area in which we place and have the number of children with which we are -- or don't have the number of children with which we place infants, then we pursue -- we invite them to an adoptive group meeting to which they come and meet with our caseworker, and at that time they are given

formal applications. And then it is after that that the adoptive study starts. And once the adoptive study is completed and they have -- if they have been approved, then they are on the waiting list, so to speak. And as we decide on a family for a baby, we have anywhere from three to five or maybe more, but [164] usually I bring it down to three to five families that we bring in to a committee meeting of members of our staff who have been involved with the parties involved in this, to consider this placement, and that would be our adoption caseworker, who has done the adoption case study, our maternity caseworker, who has worked with the natural parents, and the foster care worker, who has worked with the child while it's been under care, and the director of social services, or myself. And we look at all of the information, the background information on the natural

parents and on the adoptive family, and look at the child, and if it's -- you know, particularly if it's an older child, and make a determination as to what we feel is the most appropriate family for that baby.

Q. Now, the child, the subject of this suit, is approximately eight months old; is that correct?

A. Yes. About seven and a half.

Q. Do you all try to place a child as soon after birth as possible.

A. Yes. We place it as soon after termination hearings as possible.

Q. And you try to get the termination as soon after the birth as you can?

A. Yes.

Q. That is so that the child can go into the new home at the earliest age possible; is that correct?

[165] A. Yes.

Q. Nancy, is there any specific group of people that are excluded from consideration? Well, let me just be specific. Is there any requirement that adoptive parents be a member of a particular church before they can qualify as potential adoptive parents from Christian Homes?

A. Our agency is supported by the Church of Christ, and we give preference to families who are members of the Church of Christ. We place twenty-five or thirty children a year, and as a result of getting between three hundred and three hundred twenty-five inquiries, that obviously means that we place primarily with members of the Church of Christ, and particularly our infants. We refer other families who contact us to other agencies, and to those, particularly, of their own religion, because most non-profit religious or church-related child-placing agencies do give

preference to their own religion.

Q. But because of just the sheer number of applicants that you have, it is pretty well narrowed down to the preference that you give because of your association with the Church of Christ?

A. That's correct.

Q. During the years that you have been associated with Christian Homes, have you ever known of an occasion where a child was brought to your home for adoption and you [166] have not been able to place that child?

A. Only some older children that have some really special needs that we have in long-term foster care, like a little boy with M.S. that we have in care, and an older child, some teenagers. All of our younger ones, infants and pre-school and early school age, we were able to place for adoption, whatever the problem.

Q. And you presently have a family that is ready and willing to take this eight-month-old child into their home and rear it as their child; is that correct?

A. Yes.

Q. And this family has met all the stringent requirements that you have imposed upon yourself over the years?

A. Yes.

Q. Nancy, I believe you have prepared a list of expenses, et cetera. Could I have that marked, please?

(Thereupon, the instrument was marked for identification as Petitioner's Exhibit Number Two.)

Q. Nancy, before we go into any of the matters set out on this exhibit, I just want to ask you if you prepared this and if this reflects the expenses that Christian Homes has had in relation to the birth of this child.

A. Yes, I did, and it does.

Q. Accurately reflects the expenses?

[167] A. Expenses, yes.

THE COURT: Any objections?

Are you offering that into evidence?

MR. MYERS: Yes.

MR. SCHULZ: No objection, your Honor.

MR. BROWN: No objection.

THE COURT: It is received.

(Thereupon, the instrument previously marked for identification as Petitioner's Exhibit Number Two was received into evidence, and is attached hereto.)

MR. MYERS: Q. Nancy, let's start off with the expenses of the maternity home care. What is the -- On this particular case, what is the total expenses for the baby child of R L . S .?

THE WITNESS: A. For care in the maternity home; is that what you are asking?

Or the baby?

Q. No; for the care in the maternity home. Do you have a monthly rate that you charge on that?

A. Yes. Well, we have a monthly rate for the girls. It's a sliding scale, from twenty-five dollars to a hundred and twenty-five dollars. But our cost per month is a little over three hundred dollars.

Q. So in this particular case, if she stayed there five months, your total expense was --

[168] A. Fifteen hundred dollars.

Q. And have the S made any payments toward that expense?

A. Yes. They have paid five hundred dollars. They paid each month, a hundred dollars a month, while she was in there.

Q. All right. From the record that

you have prepared, the hospital bill was how much?

A. $2,144.59 for R .

Q. And Doctor Estes's bill?

A. I'm sorry; I included his bill in that.

Q. All right.

THE COURT: Mr. Myers, is this pretty self-explanatory? I can see what it reads.

MR. MYERS: All right.

Q. The total of the expenses that Christian Homes has had, Nancy, is what?

A. Okay. It's $4,256.03 for R and her baby, the medical care and hospital care and the in-home care and all.

Q. Have you received any money fron Donnie Kirkpatrick for any of these expenses?

A. No.

Q. Has he offered to pay you any money?

A. No.

Q. After the child was born, has he made any inquiry [169] of Christian Homes as to the welfare of the child?

A. No, other than that one time that I talked to him on the phone right after the baby had been born.

Q. Right after?

A. I have not talked to him since then.

Q. Okay. Nancy, do you have an opinion as to the best interests of this child? After all, that is what we are trying to determine this afternoon.

A. Yes.

Q. What, in your opinion, would be the best interest of this child?

A. My opinion is that the best interests for this child would be to be placed for adoption in a home where two -- there are two parents who can provide

the stability for the home, who are prepared for it, and who can provide the parenting skills as a mother and father that I think it should have. I think that we can provide a family for that home who has planned for and prepared for a baby and who can -- well, give it the, as I said, the stability and the security and the spiritual training of the home that we would -- our agency would want for it, and also that I believe that for which R has given us the responsibility to find a home for.

Q. Nancy, you have had the opportunity of listening to the testimony this afternoon. Do you have an opinion as to whether or not it would be in the best interests of the child [170] to allow the child to be legitimized by the father and return back to York, Nebraska, with Donnie Kirkpatrick?

A. Yes, I do.

Q. What is that opinion?

A. My opinion is that that would not be in the best interests of the child.

Q. And from what you have heard through the testimony, what do you base that opinion on?

A. On the testimony and on -- Well, on the testimony that I have heard today and the fact that -- I don't feel that Donnie can provide the stability. It appears to me that he does not live independently and that it would be his family or someone within his family raising the child more than Donnie. I am concerned about his inability to make decisions on his own and to vacillate so much as he has in our conversations with him, and from what I have heard today, also. I also feel that the testimony today has shown some things about his home that would not be in the best interests of the child from our standpoint

of wanting to find a home that would provide spiritual training for the child and the -- Well, I'll stop there.

Q. Is there anything other than the spiritual training that would cause you to believe that it would not be in the best interest of the child to be brought up in that home environment?

A. Yes. It doesn't -- It does not -- Well, I would [171] be concerned about the drinking on the part of Mr. Kirkpatrick and, again, what appears to be his making decisions for Donnie. I would be also concerned about the child being brought up in that community with R 's family living there. And R has made a decision and a plan for her baby as far as she is concerned, made it out of love, I think, and out of concern for the best interest of the child. I'm not sure that child would be told that, since Donnie's parents seem to

feel like she gave it away and that she didn't feel love and care for it, and I think that could be very damaging for the child to grow up believing that her mother felt that way about it.

Q. Is Christian Homes here this afternoon taking the action that they are taking because of R 's desire in this matter?

A. Yes.

Q. And that is one of the strong things that guides Christian Homes in the placement of children; is that correct?

A. That's correct.

Q. And do you feel that P -- You know her personally. Do you feel that she loves the child any less because she has made this very hard decision to make about her child?

A. I'm sure she doesn't love the child less.

MR. MYERS: I pass the witness.

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[172] MR. SCHULZ: I have no questions.

MR. BROWN: No questions.

CROSS EXAMINATION

BY MR. MOORE:

Q. Ms. Miller, has Christian Homes ever adopted out a child to a family that wasn't Church of Christ, ever?

A. No. Not to my knowledge.

Q. Has that got anything to do with your testimony here today, that he is not one of the chosen?

A. No.

Q. But you have never adopted one out to anybody that wasn't Church of Christ?

A. That's correct, to my knowledge, since I've been there.

A. Okay. You had in your question-

naire that he was a Presbyterian; you had that information?

A. Yes.

Q. Have you told the prospective parents of this child that you are going to adopt it out to that it may be an [173] epileptic?

A. No. We don't talk to them until we know the child is legally --

Q. Are you going to do that? Are you going to tell the prospective parents that there is a very very good change that this child well be an epileptic because its father was?

A. Yes, sir.

Q. Don't you think it would be better for a child if -- I'm not saying that it's going to be an epileptic, but if it were, wouldn't it be better for a child to be raised by a parent who had epilepsy himself, if it was his own blood, he knew and

understood his problem, cared for him because it came from his own loin?

A. Not necessarily. I think parents who don't have epilepsy can love and care for a child just as much.

Q. Do you have children?

A. No.

Q. The vacillation that you are worried about. Would it be hard for you to understand, Ms. Miller, that maybe the reason he was vacillating is because this little girl is begging him and telling him "If you don't want to hurt me, you'll do what I want you to do in this matter"? Don't you know it has hurt this boy to proceed with this action when he knew it just totally destroyed his relationship with the woman he loves very dearly?

[174] A. I believe it has hurt him, from what he has said, and the relationship, but --

Q. But don't you know that that would be difficult for him to do that?

A. Yes, I do.

Q. He loves the mother dearly.

A. Yes, I know that.

Q. So why is that -- Why is the vacillation so concerning, if that's the reason for his vacillation, if she's begging him and entreating him and begging him, telling him that, you know, "If you love me, you'll do this for me." Wouldn't that be a -- rather than showing instability on his part, wouldn't that be a showing of nobility? That's a noble act; he does not want to hurt this woman, but he wants his child.

MR. MYERS: Objection, your Honor, He is being argumentative with the witness.

THE COURT: I sustain the objection.

MR. MOORE: Q. Is that difficult to

understand?

THE WITNESS: A. No.

Q. Do you believe that single parents cannot be good parents?

A. I think some can.

Q. Okay. People all over this country, single parents, [175] are doing an excellent job of raising children. Is the fact that he doesn't have any training and doesn't know anything about raising children, does that bother you? My first son -- When my first son was born, I knew absolutely nothing about children.

THE COURT: Mr. Moore, would you please not argue with the witness, and don't testify.

MR. MOORE: All right.

MR. MOORE: Q. Does that bother you?

THE COURT: It doesn't matter whether it bothers her. Just ask her questions about the facts, and I will draw

conclusions.

MR. MOORE: All right.

MR. MOORE: Q. Is that one of the things that makes you believe that he will not be a good parent?

THE WITNESS: A. I'm sorry. Is that one of the things -- The fact that he is single?

Q. Yes, ma'am.

A. No.

Q. Okay. You don't know anything other than what you have heard today about his family, his parents; you've never seen his home. I guess you have looked at that picture.

A. No, I haven't seen the picture yet. I just heard what I've heard today and what R has shared with me while she was at the maternity home.

[176] Q. Did Mr. Bolton, Andrew Bolton -- He was responsible for this case, wasn't

he?

A. He was director of social services at the time she was there, and he supervises all the workers in this area.

Q. Well, did he have some responsibility in this matter?

A. Yes. He talked with Donald in this matter. And the reason was that a caseworker who had worked with her up to this time had resigned, and so we were in a kind of a transition period, and so he did work on this case some. He doesn't ordinarily do that directly with the girls. We were kind of sharing some responsibilities at that time.

MR. MOORE: That's all the questions I have.

REDIRECT EXAMINATION

BY MR. MYERS:

Q. Nancy, even if this family were

members of the Church of Christ, would they meet all of your criteria?

A. No, they would not.

Q. Is you opinion based not only on the fact that Donnie is not married but also that the child is going to be raised not only by Donnie but by a grandmother, grandfather, [177] sister, brother, whoever may be there? Isn't that part of your decision-making?

A. That's correct.

MR. MYERS: I pass the witness.

THE COURT: Any other questions, anybody?

Has Christian Homes ever allowed an adoption to a single person?

THE WITNESS: A. No.

THE COURT: That is all I have. You may step down.

MR. MYERS: Petitioner rests, your Honor.

THE COURT: Any other rebuttal, or any other witnesses?

MR. MOORE: No, sir.

THE COURT: The Court is going to take a five-minute recess.

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[178] THE COURT: All right. It is satisfactory with everyone, I guess, at this point, to allow the witnesses to come in; even though it is a closed hearing, we are not excluding the witnesses at this point; is that correct? Does anybody object? If so, let me know.

MR. MYERS: I have no objection.

THE COURT: All right. Go ahead and have argument at this time. Mr. Moore, you may open the arguments.

MR. SCHULZ: There are some more

people on the way, Judge.

THE COURT: They can come on in if they want to.

MR. MOORE: Judge, I am going to be very brief. It has taken longer than anyone expected it to. I know the primary concern of the Court is the best interest of the child. And in considering the best interest of the child, I don't think the law is set up for the Court to make a decision that will place the child in a better social strata or under a better financial situation that he was born into. I think the Court, in taking the best interest of the child into consideration, should consider whether or not the child is going to be living with his own people, with his own blood. That seems to make no difference to the Christian Homes. Maybe they have become hardened after adopting out so many children. My family and my blood mean a

great deal to me. And I think [179] that's important. I think it should -- I think that this boy and his family are very concerned about that child, he about his daughter, they about their granddaughter, and about what is going to become of her. They don't know Christian Homes, and they don't know what kind of a situation that they are going to put that child in.

No matter what the situation is, they feel like the child would be better off with its own people, with them. Now, maybe they don't have the finest home. It may be an old home. But I don't think the Court will have any problem knowing what kind of people that these folks are: third or fourth generation farm people from Nebraska; they are honest, hard-working people. They have raised seven children of their own in that very house. This boy doesn't have to stay in that house. He

can stay there; he can move out; he can move down the road, get his own place.

There is no reason why a single parent who is twenty-five years old, mature, responsible, cannot raise this child and do a good job of it. And I think the Court should give some consideration to the fact that it is his child. It's his. He is the biological father. I feel like that he should be given more consideration than what the law seems to accord him in the books. The objection of the Christian Homes to him being the managing conservator, the child being legitimated and him being named the managing conservator, is [180] his vacillation about making his decision, which I think has been reasonably explained away, and the fact that he is a single parent. I ask the Court very earnestly, in making your decision about the best interest of this child, to consider

that this child is from his own loins.

Thank you, Judge.

MR. MYERS: Your Honor, first of all, I will also likewise try to be as brief as possible. Mr. Moore seems to think that Mr. Kirkpatrick should be given more consideration than the law gives him. The Supreme Court of Texas has recently spoken on this precise question that we have as to whether or not a biological father should be given the same type of rights as a mother, a parental right. And what we are talking about this afternoon, of course, is whether or not he is entitled to have that relationship established.

Now, the Court is guided in looking at two things in determining that. Number one, as stated in the case at 535 SW2d 168, the Court has the discretion to see, number one, that the one who would seek to as-

sume the parental rights and responsibilities is fit to do so. That's the first hurdle we have to make. And then number two, if that person is fit to do so, whether or not it will be in the best interests of the child to allow that person to establish the parent-child [181] relationship. I don't believe that Mr. Moore, through his testimony of his client and his witnesses, has shown by a preponderance of the evidence -- And the burden of proof in a cause like this is upon the petitioner, in this case the cross-petitioner, to prove by a preponderance of the evidence that it is in the best interests of the child to allow him to legitimate the child, to allow him to establish a parent-child relationship.

The cases also speak in terms of the wishes of the mother. The cases talk about the strong weight that should be given to

the mother, because she is the person who has borne the child and has cared for the child, not just the biological father. The biological father has no responsibility until the Court says that he has the responsibility to do so.

In this case the wish of the mother, R S , is that the child be allowed to be placed with Christian Homes and to be placed for adoption. This does not mean that she does not love her child, that she does not care just as deeply for the child as any other mother in the world does. I believe that she cares for the child more. She cares for him so much that she wants the very best for him, and that is why she is contesting this proceeding. She knows Donald Kirkpatrick better than anyone in the courtroom, and she knows that to allow his petition would not be in the best interest of the child. And I believe that

she loves that child so much that [182] if she did feel that it would be in the best interest of the child to allow Donald to be successful in this action that she would say so, and she would not have pursued this matter as far as she has.

Christian Homes of Abilene has a good track record. They screen the families very well. They place the child in the best situation possible, and in this case they have even gone so far as to choose prospective parents. If this Court sees fit to deny the petition this afternoon, there is a parent waiting in the wings, two parents waiting in the wings, to take care of this child.

We have heard testimony from R , from the S , and from Ms. Miller as to the best interest of the child. I would just ask the Court to weigh their testimony: the emotional testimony of Mrs.

', the very expertly-given testimony of Ms. Miller, with all of her vast dealings in cases like this, and compare that testimony to the testimony of the Kirkpatricks and the testimony of Donnie. I hope this Court will be, and I trust the Court will be guided in making the right decision in determining that it would be in the best interest of this child to not allow the petition of Donald Kirkpatrick and to allow Christian Homes to place this child in a suitable home. Thank you.

THE COURT: Mr. Brown, do you have any [183] argument?

MR. BROWN: Just two things, your Honor. First, as the attorney ad litem for R being a minor mother, I would suggest to the Court that the evidence has shown sufficiently that she was aware of what she was doing and did voluntarily and

understandingly relinquish her parental rights. And certainly, in considering her interests, I would ask the Court that in the event the Court should decide to grant the motion of Donald Kirkpatrick that, then, in that event, that my client's parental rights not be terminated so that as between the two parents in that event some further disposition might be either worked out or further pursued in the courts.

THE COURT: Mr. Schulz.

MR. SCHULZ: If it please the Court.

I know the Court is familiar with the law that there is no presumption that legitimation is in a child's best interest. In this instance, however, how fortunate is this child that so many people are truly interested, apparently, in the child's best welfare. I know the Court will weigh

the evidence and come to a just decision as to what is in the best interest of the child. That is my sole aim here, is to protect the child.

THE COURT: Is that enough argument for [184] everybody? All right.

I purposely asked that the grandparents come in. They came here as witnesses and are very interested in the outcome of this case and very interested in the best interests, I believe, of this child. I -- You know, I could take this thing under advisement and sit on it for a day or two, or a week, and leave everybody in suspense, and write the attorneys, and that would be the easy way for me to do it. However, I don't believe that is what I was put on this bench to do, and I am going to go ahead and render a decision.

Let me state initially that I think

both of these families are fine families. I respect farming people. I've got farming people in my family and in my wife's family, and I can understand the problems that arise in living with a house that was constructed in 1905. I think you are fortunate to still have that house.

I think that this young man here is doing a good job with his life. He is apparently working hard on that farm, and he is going to make something of himself. And I believe that the S have the best interest of the child, also, in mind, and the child's mother, R , has the best interest of the child in mind.

The Court finds that this young man here would, in fact, be a proper person to have parental rights under perhaps other circumstances, if it was other circumstances. [185] Those circumstances do not now exist.

It will be the order of this Court that the parental rights of R S will be terminated as alleged in the petition and that the petition for legitimation will be denied. The Christian Homes will be appointed managing conservator of this child.

I wish I didn't have to make decisions like this. This is probably as hard a decision as I have made since I have been on the bench, and I -- You know, it fell in my lap, and there I am, and I've got a child in the middle. I just hope I am making the right decision for this child. Thank you.

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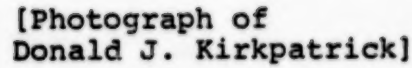
[186] PETITIONER'S EXHIBIT NO. 1


[Photograph of
Donald J. Kirkpatrick]

[187] PETITIONER'S EXHIBIT NO. 2

PX2
8-28-81

" "

Hospital	1,663.90	
Dr. Estes	450.00	
Pharmacy	30.69	
Total Medical	2,144.59	
Maternity Home Care - 5 mos.	1,500.00	
Less payments	500.00	
Total Resid. Care	1,000.00	
Total-Lin		3,144.59
Baby Girl		
Hospital	177.85	
Dr. Barron, Pope	313.00	
Pharmacy	41.49	
Legal	40.00	
Abilene Pediatric	42.00	
Radiology Assoc.	32.50	
Total Medical	646.84	
Foster Care	464.60	
Total-Baby		1,111.44
Total - and Baby		4,245.03

[188] CROSS-PETITIONER'S EXHIBIT NO. 1

TEXAS DEPARTMENT OF HUMAN RESOURCES

June 15, 1981

Honorable Henry J. Strauss
Judge 326th District Court
Taylor County Courthouse
Abilene, Texas 79602

RE: Cause No. 5038-C
In the Interest of Baby Girl S
Disputed Custody Study

Dear Judge Strauss;

Attached is the Social Studies requested on Christian Homes of Abilene, and Cross Petitioner, Donald J. Kirkpatrick of York, Nebraska. The Social Study of Donald J. Kirkpatrick was prepared by Karolyn K. Rehor, Social Service Worker II of the Multi-County Service Unit #151 of Seward, Nebraska.
If I can be of any further assistance, please feel free to contact me at 673-7811 or 677-1711, extension 351.

Sincerely,

/s/
Elaine Fitzgerald
Child Placement Worker I

APPROVED BY
/s/
Brenda Harlow
Supervisor

SOCIAL STUDY

Cause No. 5038-C

IN THE MATTER OF CROSS-PETITIOER CHRISTIAN HOMES OF ABILENE	JUDGE HENRY J. STRAUSS, PRESIDING JUDGE IN THE 326TH DISTRICT COURT OF TAYLOR COUNTY, TEXAS
AND IN THE INTEREST OF BABY GIRL S , A CHILD	

PURPOSE:

This social study into the circumstances and conditions of the child involved in this suit, and of the agency seeking managing conversatorship is respectfully submitted to Judge Henry Strauss as requested.

Comes now Elaine Fitzgerald, caseworker of the Taylor County Child Welfare Unit, duly appointed investigator in the above matter, and presents the following report:

Christian Homes of Abilene, a private child-placing agency, was established by the Highland Church of Christ. It works under the direction of its Elders. The family service agency is licensed for foster care, adoptive placement, maternity care for unmarried pregnant girls, and a contract with the Department of Human Resources to place special needs children.

Licensing Standards:
In December of 1962, Christian Homes of Abilene received its charter (verified). The Child Care Committee became the administrative board, and the Highland Elders became, for legal purposes, the Board of Trustees for the agency.

In September of 1964, the agency was licensed by the State Department of Public Welfare, which licensed it for foster care and adoptive placement.

The Department of Human Resources issues Christian Homes of Abilene a license every two years, assuming they meet the minimum health and fire inspections. During each year the Department of Human Resources makes three routine inspections of the Christian Homes of Abilene. Other requirements that must be met every two years include: minimum organization and administrative requirements, home standards, and adoptive home standards.

The Christian Homes of Abilene Maternity Home is licensed by the States Department of Health. The license is renewed once a year, providing it meets the inspections that are made twice yearly. The requirements that Christian Homes of Abilene must meet include basic sanitation and dietary requirements. Admittance of a woman to Christian Homes of Abilene must be ordered by a doctor. All medical needs must be stated before a woman is admitted to Christian Homes.

Goals of Christian Homes of Abilene:

1. To provide counseling services to disentegrating families in an effort to keep the children with their own families. 2. To offer child care services to children needing placement away from their families through foster family service, adoptive placement, or placement in a motherhood children's home. 3. To provide care and counseling for girls who are pregnant outside of marriage.

Adoption Services:

The services of Christian Homes of Abilene are available to children of all ages, races, and religions. The adoptive parents must be 21 years of age and have been married for three years. Because Christian Homes of Abilene is supported primarily by the Churches of Christ, preference is given to them in placing children for adoption.

Foster Care Services:

Children of all ages, races, and religions are accepted for foster care. The children come for temporary care through voluntary agreement or relinquishment from parents or by court order through the Department of Human Resources.

All foster homes must be licensed by the State through Christian Homes. A caseworker supervises the homes, and is available for counseling and support. Foster families must live within a 75-90 miles radious of Abilene.

Maternity Care:

The services available to unwed parents include counseling for them and their families, and residential care for the unwed mother. Counseling is provided to enable the unwed parents in making important decisions for themselves and their babies. School-aged girls may continue their education while at the home.

The following information was supplied by Nancy Miller, Executive Director of Christian Homes of Abilene. Christian Homes of

Abilene is comprised of the following: Executive Director, Nancy Miller; Joe Griffin and Andy Bolton, Board of Directors; a Board of Trustees which includes 13 members, and an Administrative Board of 18 members.

Ms. Miller stated that Christian Homes of Abilene has had approximately 485 unwed mothers in their homes. In the foster care program she stated that they have cared for more than 800 children. In their adoption services they have placed approximately 500 children.

Ms. Miller stated that it costs approximately $400 per month to provide services in their maternity home. She explained that a portion of this is paid for by fees, and the rest of the amount is provided by church and individual loans.

Ms. Miller stated that there are three caseworkers employed by Christian Homes of Abilene. At this time Ms. Jeanie Bailey is the foster care worker. Ms. Vickie Cardol is employed as the maternity care worker, and Ms. Joe Griffin is the adoption case worker. Included among the employees are houseparents who work 100% for the girls.

Evaluation:

In addition to the services that are provided for by the State, Christian Homes of Abilene provides spiritual growth through the support of Christians in which it ministers to those who come to the agency for help. For over a decade Christian Homes of Abilene has channeled the faith and compassion of Christians into skillful services to families who need help.

/s/
Elaine Fitzgerald
Child Placement
Worker I
Taylor County Child
Welfare Unit

/s/
Brenda S. Harlow,
Supervisor
Taylor County Child
Welfare Unit
Texas Dept. of
Human Resources

STATE OF TEXAS
COUNTY OF TAYLOR

Before me, the undersigned authority, on this day appeared Elaine Fitzgerald, known to me, who being first duly sworn under oath, deposes and says that she is the person whose name is signed to the foregoing report, and that the statements therein contained are true and correct to the best of her knowledge and belief.

/s/
Elaine Fitzgerald

Sworn to and subscribed before me, the undersigned authority, on this the 16th day of June, 1981.

/s/
Crika Hartness, Notary Public
In and For Taylor County, Texas

MULTI COUNTY SOCIAL SERVICE UNIT #1 1
MULTI COUNTY SOCIAL SERVICE UNIT #151

Homestudy

Date Prepared: June 3, 1981

Prepared By: Karolyn K. Rehor, Social
Service Worker II
Multi County Service Unit #151

Prepared For: Honorable Henry J. Strauss
326th District Court Judge,
Taylor County
Abilene, Texas 79602

I. HEADING

Donald J. Kirkpatrick
DOB: April 08, 1956
Rural Route 1, York, NE
York County Nebraska
Telephone: 402-362-2424

II. SOURCES OF INFORMATION

Mr. Donald J. Kirkpatrick, Cross-Petitioner, was interviewed in his home May 28, 1981, in York, Nebraska.

III. REASON FOR REQUEST

This homestudy was ordered to determine if Mr. Kirkpatrick should be granted legitimation of his daughter, Baby Girl S , born out-of-wedlock. The Court has ordered that this homestudy address the areas of the suitability of Mr. Kirkpatrick's home for the child.

IV. REASONS FOR WANTING CHILD

Mr. Kirkpatrick indicated that his parents, and siblings are supportive of his desire to the legitimization of his daughter. Mr. Kirkpatrick said his mother is more neutral, and wants him to make the decision himself, although she is very willing to help him should he receive custody of his child. Mr. Kirkpatrick's father however, is more vocal as to his feelings: Mr. Kirkpatrick said his father feels Donald should 'look out' for his own daughter and questions Donald as if he could live with the knowledge that his daughter is living with strangers (non-relatives).

Mr. Kirkpatrick stated he would live at his parents home until he could handle all the responsibilities of caring for his infant daughter himself. His sister, age 20, also lives with his parents, and has agreed to provide daycare for his child while he is working. (Mr. Kirkpatrick's mother works outside of the home, but would apparently be willing to resign to help care for the child should it become necessary.)

Mr. Kirkpatrick said he has plans of telling his daughter about her mother and the relationship between her mother and himself. He wants his daughter to understand the circumstances pertaining to her birth and that her mother is a good person and someone she should love.

V. DELINEATION OF DONALD J. KIRKPATRICK

Education: Donald graduated from York High School in 1975.

Work Experience: Mr. Kirkpatrick has been engaged in farming since graduating from High School.

Military: Not applicable.

Health: Mr. Kirkpatrick has epilepsy, due to this condition he takes medication twice daily. He reports he has not had any seizures for 1-1/2 years.

Donald reports his general health to be good.

Social Pathology: None reported.

Personal Qualities: Mr. Kirkpatrick described himself as a quiet person, but one who enjoys helping others. He said he feels more comfortable in smaller groups.

Donald also expressed to me that he has been depressed lately due to the circumstances of R 's pregnancy and the birth of his daughter. However, he feels that once things are finalized, he will be able to accept the court's decision and go from there. He feels right now that his life is in Limbo, not knowing if he will receive custody of his daughter or not.

VI. CHURCH

Mr. Kirkpatrick is not affiliated with any church.. He said he would not hinder his daughter's desire to attend the church of her choice; however, this

would be her decision.

VII. OCCUPATION/INCOME

Mr. Kirkpatrick farms with his father. The operation is mostly livestock farming with limited grain farming.

Donald said his income varies each year due to the fluctuating livestock market.

Mr. Kirkpatrick reported his approximate gross income in 1979 was $16,000.00, and in 1980 $10,000.00. Donald said he has no outstanding debts, everything he owns is paid in full.

Mr. Kirkpatrick said he feels that he could adequately support his daughter on his earnings.

While R was in Texas awaiting the birth of their child, Donald kept in touch with her via letters and telephone calls. Donald also mentioned that he often enclosed money to R when he wrote her.

According to Donald, he had asked R 's parents if he could pay for R 's Doctor bills and her room and board payments, but her parents refused his offer.

Since February, 1981, Mr. Kirkpatrick has sent $100.00 per month to the District Court in Abilene, Texas, for the support of his daughter.

VIII. MARITAL INFORMATION

Mr. Donald J. Kirkpatrick has never been married. He still desires to marry R S , the mother of his child, however, R does not feel ready to marry due to her age, according to Donald.

Donald and R had dated steadily for two (2) years prior to her moving to the Christians Homes of Abilene, Texas to deliver her child. This couple have had contact once in R 's parents' home since she returned to York.

IX. EXPERIENCE WITH AND ATTITUDE TOWARDS CHILDREN

Donald Kirkpatrick stated he has had some experience with small children. He was able to help his parents with some child care duties when his youngest sister was growing up.

Donald said his parents were firm in their discipline of their children without being strict. He feels a child should never be spanked or struck. He feels parents should put limits on a child, and should administer discipline by discussion, sitting them on a chair and other similar acts.

X. WORKER COMMENTS

In my opinion, it appears that Donald J. Kirkpatrick is feeling quite guilty about the event of his daughter's birth. Although he has never seen

his daughter, he expresses much concern over her and has expressed this financially to the Court. I do believe that he is sincere in his desire to want what is best for his daughter's future, whether it is with him or with an adoptive family.

Ideally Mr. Kirkpatrick would like to marry R , receive custody of their daughter, and set up a home together. However, Mr. Kirkpatrick did not forsee this as becoming a reality in the near future, and expressed some doubt as if R would ever marry him.

Mr. Kirkpatrick had talked to R after her return to York about his desire to receive custody of their child. Mr. Kirkpatrick told me that R did not wish him to receive custody of their child, or have his parents help raise the child.

Donald stated he does not feel badly toward R for relinquishing their child, and said he feels R made the right choice if she did not feel she was capable at this time in her life to have the responsibility of a child. Donald said he feels very responsible for what has happened to R since he was "older and should have known better".

In my opinion, the suit brought by Christian Homes of Abilene, Inc., in which they quote Section 15.02(H), is not accurate in that Mr. Kirkpat-

tick did not abandon his child's mother during her pregnancy (he corresponded with her via letters and telephone), nor has he failed to provide adequate financial support for his child since he was made aware of her birth.

In my judgment, Mr. Kirkpatrick could adequately provide for his daughter's emotional, physical, and financial needs should the Court grant him custody of his daughter, Baby Girl S .

Mr. Kirkpatrick is awaiting notification of the Court hearing date, as he is making arrangements to attend.

/s/
Elaine Fitzgerald
Child Placement Worker I
Taylor County Child Welfare Unit

STATE OF TEXAS
COUNTY OF TAYLOR

Before me, the undersigned authority, on this date appeared Elaine Fitzgerald, known to me, who being first duly sworn under oath, deposes and says that she is the person whose name is signed to the foregoing report, and that the statements therein contained are true and correct to the best of her knowledge and belief.

/s/
Elaine Fitzgerald

Sworn to and subscribed before me, the undersigned authority, on this the 16th day of June, 1981

/s/
Notary Public
In and For Taylor County, Texas

FILED

AT 8:55 O'CLOCK AM

JUN 17 1981

IRENE CRAWFORD

DISTRICT CLERK, TAYLOR COUNTY, TEXAS

/s/ DEPUTY

5038-C

[189] AGREEMENT OF COUNSEL

It is agreed by and between the parties hereto that the above and foregoing is a full, true, and correct statement of facts adduced upon the trial of said cause.

Mr. Ed Myers

Mr. Sam Moore

Mr. Stan Brown

Mr. Malcolm Schulz

APPROVAL OF THE COURT

The above and foregoing transcript examined, found correct, approved, and ordered filed as the Statement of Facts in this cause, this the ___ day of _____ 19____.

Billy John Edwards
Judge Presiding

[190]
THE STATE OF TEXAS)
)
COUNTY OF TAYLOR)

I, Lana Trigg, a Certified Shorthand Reporter in and for the State of Texas, do hereby cerfity that during the hearing of the above-styled and numbered cause I took shorthand notes of the proceedings upon said hearing and have transcribed same as shown by the above and foregoing 190 pages, and that said Statement of Facts is full, true, and correct.

This 28th day of October, 1981.

/s/
Lana Trigg, C.S.R.
Official Court Reporter
104th District Court

COST of this statement of facts:
$570.00, paid by Cross-Petitioner

In Re: Baby Girl S, A Child

No. 11-81-157-CV -- Appeal from Taylor County

Christian Homes of Abilene, Inc., brought suit to terminate the parent-child relationship of an infant girl, B.G.S. The unmarried biological father filed a cross action seeking to legitimate the child and gain her custody. Following trial before the court, judgment was entered that the parent-child relationship between the mother and B.G.S. be terminated; the father's petition to legitimate be denied and all his rights to the child be foreclosed; and Christian Homes be appointed managing conservator of B.G.S. The biological father appeals. We affirm.

In his first point of error the biological father contends that the trial court abused its discretion by denying

the petition for voluntary legitimation.

At the time of the hearing, August 8, 1981, the natural mother was only sixteen and the biological father was twenty-five years old. They had met through the father's sister and had a premarital sexual relationship for at least a year and a half before the child was conceived in April, 1980. After being aware of her pregnancy, the girl considered and discussed her alternatives with her parents and the father and chose to go to a home for unwed mothers operated by Christian Homes. She concluded after additional counseling regarding whether she should keep the child or permit its adoption that it would be in the best interest of the child to relinquish her parental right and allow the child to be adopted. After the birth of B.G.S., the mother executed an Affidavit of Relinquishment of Parental Rights pur-

suant to TEX. FAM. CODE ANN. § 15.03 (Vernon Supp. 1981).

At the hearing the biological father testified: "All I can say is I love my daughter and I want her, and she's blood, and I just can't see letting her go when I want to raise her myself." His plans included returning with her to the same small town where the illicit sexual activity occurred and included the assistance of his mother and sister in the rearing of the child. Although the biological father testified as to his readiness to pay all cost involved in the pregnancy and the delivery and care of the child and her mother, there had never existed a family relationship between himself and the child. The biological father had a form of epilepsy called grand mal which was controlled with medication.

The testimony reflects that the parents of the mother disapproved of the relationship between the mother and the biological father and forbade the consumation of a marriage relationship. It was the mother's desire that the child be adopted and reared in a two-parent Christian family. The mother herself was an adopted child and was aware of the stigma under which an illegitimate child suffers. She testified that in her opinion adoption would serve the best interest of the child. Her parents were supportive of the mother and her decision.

TEX. FAM. CODE ANN. § 13.21 (Vernon Supp. 1981) provides that in a voluntary legitimation suit where the mother or managing conservator fails to give consent to the legitimation by the biological father, the court may consent to the legitimation provided the entering of such a decree is in the best interest of

the child. (Emphasis ours)

As stated by the court in Travis County Child Welfare Unit v. Vance, 566 S.W.2d 112 (Tex.Civ.App. - Austin 1978, no writ): "It is the child's best interest, and not the interest of the biological father, which must be served by legitimation. § 13.21(c)."

The Texas Supreme Court in In the Interest of T. E. T., 603 S.W.2d 793, cert. denied, 450 U.S. 1025 (1980), considering the child's best interests said:

> It is easy to understand her decision here that it would not be in the child's best interest for her to be turned over to the nineteen-year-old father and be reared by him in the small town where the illicit sexual activity occurred. On the other hand, the best interests of the illegitimate child will more likely be served by her adoption into a family who will give her the stability of a normal, two-parent home. Moreover, adoption will remove the stigma under which an illegitimate child suffers.

We have carefully reviewed all the

evidence and find no abuse of discretion by the trial judge in denying the petition for voluntary legitimation. In the Interest of C.D.V., 589 S.W.2d 543 (Tex. Civ.App. - Amarillo 1979, no writ).

The first point of error is overruled.

In his second point of error, the biological father urges:

> Section 13.21, Voluntary Legitimation, Family Code, V.A.T.S., is unconstitutional in that it violates the equal protection and due process clause of the fourteenth amendment to the United States Constitution.

This contention has been overruled by the Texas Supreme Court in In the Interest of T. E. T., supra. There the court said:

> The narrow issue before us is whether the gender-based distinction of the Texas statutory scheme for establishing status as a parent is substantially related to the important state objective of promoting the best interest of children born out of wedlock and is substantially related to the achievement of this objective. We

hold that it is so related.

* * *

> The biological father was given timely notice of the proceedings to terminate the mother's parental rights and, in response, brought suit as permitted under the Texas Family Code to legitimate the child. He thus had the procedural due process required by Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

The second point of error is overruled.

Next, appellant argues that the court erred in overruling his motion for amended or more specific findings of fact and conclusions of law.

The court in City of Fort Worth v. Bewley, 612 S.W.2d 257 (Tex.Civ.App. Eastland 1981, writ ref'd n.r.e.), considering such a point of error, said:

> Additional findings are not required where the requests do not relate to ultimate or controlling issues, or where they conflict with the original findings of fact which were made and filed by the trial judge. State v. Wiergate Lumber Company, Inc.,

> 582 S.W.2d 258 (Tex.Civ. App. - Beaumont 1979, writ ref'd n.r.e.).

In the case at bar, the additional findings and conclusions either conflict with the original findings and conclusions, or do not relate to the ultimate or controlling issue in controversy. The point of error is overruled.

Finally, in a supplemental brief the biological father contends that:

> Section 13.2., Voluntary Legitimation, Family Code, V.A.T.S., is unconstitutional in that it violates Texas Constitutional Article 1, Section 3-A, the Texas equal rights amendment.
>
> The amendment states:
>
> Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin. This Amendment is self-operative.

The court in Mercer v. Board of Trustees, North Forest Independent School District, 538 S.W.2d 201 (Tex.Civ.App. - Houston [14th Dist.] 1976, writ ref'd

n.r.e.), considered whether a regulation regarding school hair length violated the Texas Equal Rights Amendment. After thorough consideration and comparison of similar enactments by other jurisdictions as well as federal court decisions the court said:

> We cannot agree with the Supreme Court of Washington that the ERA admits of no exceptions to its prohibition of sex discrimination. Any classification based upon sex is a suspect classification, and any law or regulation that classifies persons for different treatment on the basis of their sex is subject to strictest judicial scrutiny. Any such classification must fall unless the party defending it can show that it is required by (1) physical characteristics, (2) other constitutionally protected rights such as the right of privacy, or (3) other "compelling reasons." With respect to "physical characterstics" we are simply recognizing the facts of life. For us to adjudicate that women are men would be as futile as it would be absurd. Neither the ERA nor the rights established by it require us to construe it so as to deny sexual or reproductive differences between the sexes. Nor does the ERA require that such rights so established (and so long

> denied) be enforced where they come into conflict with other basic fundamental constitutionally-protected rights such as that of privacy. To justify a suspect classification by "compelling reasons" places the burden of proof and persuasion on the party defending the classification.

We hold that TEX. FAM. CODE ANN. § 13.21 (Vernon Supp. 1981) meets the "other compelling reasons" test as set forth in Mercer and, therefore, does not violate the Texas Equal Rights Amendment. The compelling reason is the important state objective in promoting the best interest of children born out of wedlock.

As stated by the court in In the Interest of T. E. T., supra:

> (T)he State has a legitimate interest in protecting the children who are born as a result of premarital sexual activity. The mother, by virtue of her pregnancy, is automatically responsible for the child. She has the physical burdens and responsibilities of the pregnancy. She can choose to abort the child or

she may carry it full term. The State has a substantial interest in encouraging the unwed mother to properly care for the child by assuring her that her wishes as to the disposition of the child will not, absent her consent or a finding of the child's best interest, be subject to the absolute veto of the biological father. This statute is substantially related to the achievement of that interest.

On the other hand, the biological father is not automatically responsible for the child. He may not have an interest in legitimating the child. He may not promptly disclose his interest in the child. In most situations, he can wait until after the child is born before committing himself. While the mother who is unmarried and pregnant is trying to figure out what she will do with the child, the father is totally free from any responsibility with respect to the child. To classify him as a parent simply because he is the biological father would give him a powerful club with which he could substantially reduce the options available to the unmarried mother. All must agree that an unmarried fourteen-year-old high school freshman has a serious problem when she discovers she is pregnant and she needs all the options that the State can properly make available to her.

The court in In the Interest of K., 535 S.W.2d 168, cert. denied, 429 U.S. 907 (1976) said:

> There is a rational basis for the state, which has an interest in securing stable homes and supportive families for children, to distinguish between the father who has accepted the legal and moral commitment to the family and the father who has not done so....Texas law offers the biological father of an illegitimate child the opportunity to prove...that he should not be treated differently from fathers legally committed to the mothers of their children....Thus S.D.A. sought and received a fair hearing....the denial of his petition for parental status was shown to be in the best interest of the child. His rights have been respected. The rights of society and baby girl K permit him nothing more.

The point of error is overruled.

Our holding on the points of error presented by appellant make it unnecessary to consider appellee's cross-point contending that appellant did not comply with the requirements of TEX. FAM. CODE ANN. § 13.21 (Vernon Supp. 1981).

The judgment is affirmed.

/s/

RALEIGH BROWN

ASSOCIATE JUSTICE

February 11, 1982

JUDGMENT

In Re: Baby Girl S., a child	X	From the 326th
No. 11-81-157-CV	X	District Court of Taylor County.
		February 11, 1982
		Opinion by Brown, A. J.

This cause came on to be heard on the record and the same being inspected, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court be, and the same is hereby, in all things affirmed, in accordance with this Court's opinion. It is further ordered that the costs incurred by reason of this appeal be, and the same are hereby, taxed against appellant, Donald Kirkpatrick, principal, and Sam Moore and Jess Holloway, sureties on his appeal bond, for which let execution

issue, and that this decision be certified below for observance.

CLERK'S OFFICE - SUPREME COURT

Austin, Texas

June 16, 1982

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of IN RE: BABY GIRL S, No. C-1190 was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON,

Clerk

THE SUPREME COURT OF TEXAS
P.O. Box 12248 Capitol Station
Austin, Texas 78711

July 14, 1982.

Mr. Sam Moore, Attorney
P. O. Box 3819
Abilene, Texas 79604

Mr. Charles E. Meyers, Attorney
104 Citizens Bank Building
Abilene, Texas 79601

Dear Sirs:

The motion for rehearing in the case of IN RE: BABY GIRL S., C-1190, was this day overruled.

Very truly yours,

/s/

Garson R. Jackson,
Clerk

Office - Supreme Court, U.S.
FILED
NOV 23 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DONALD J. KIRKPATRICK,
Petitioner,

v.

CHRISTIAN HOMES OF ABILENE, INC., and the 326th DISTRICT COURT OF TAYLOR COUNTY, TEXAS,
Respondents.

On Appeal From The Supreme Court Of The State Of Texas

RESPONDENT'S BRIEF IN OPPOSITION ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

CHARLES E. MYERS
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(915) 677-2493

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE "BEST INTEREST OF THE CHILD" STANDARD USED IN § 13.21 OF THE TEXAS FAMILY CODE VIOLATES THE MINIMUM STANDARDS OF DUE PROCESS IN ITS APPLICATION TO UNWED FATHERS IN VOLUNTARY LEGITIMATION PROCEEDINGS.

2. WHETHER THE "BEST INTEREST OF THE CHILD" STANDARD USED IN § 13.21 OF THE TEXAS FAMILY CODE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE OF THE DISCRIMINATORY TREATMENT OF UNWED FATHERS IN VOLUNTARY LEGITIMATION PROCEEDINGS.

3. WHETHER § 13.21 OF THE TEXAS FAMILY CODE IS CONSTITUTIONALLY INFIRM BECAUSE IT PLACES UPON THE UNWED FATHER THE BURDEN OF PROVING THAT LEGITIMATION WOULD BE IN THE CHILD'S BEST INTEREST.

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NO. 82-647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DONALD J. KIRKPATRICK,
Petitioner,

v.

CHRISTIAN HOMES OF ABILENE, INC., and the 326th DISTRICT COURT OF TAYLOR COUNTY, TEXAS,
Respondents.

On Appeal From The Supreme Court Of The State Of Texas

RESPONDENT'S BRIEF IN OPPOSITION ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Respondent, CHRISTIAN HOMES OF ABILENE, INC., prays that the United States Supreme Court deny Petitioner's Petition For Writ Of Certiorari filed in this

cause to review the judgment of the Court of Appeals for the Eleventh Supreme Judicial District of Texas. The Texas Supreme Court refused to grant Petitioner's Application for Writ of Error on June 16, 1982 and overruled Petitioner's Motion for Rehearing on July 14, 1982.

RESPONDENT'S JURISDICTIONAL STATEMENT

Petitioner, in the courts below, challenged the constitutionality of Section 13.21 of the Texas Family Code which sets forth the procedure mandated for an unwed father to establish his paternal rights to his illegitimate child wherein there is no requirement of a showing of "unfitness". Petitioner now for the first time attacks the "best interest of the child" standard required by Texas in voluntary legitimation proceedings in his Petition for Writ of Certiorari. Respondent, therefore, challenges the jurisdiction of this Court to consider the Petition for Writ of Certiorari for the reason that the question now alleged was never properly presented below. The question of whether or not a showing of "unfitness" was required in a voluntary legitimation proceeding has been previously answered by this Honorable Court in *Quillion v. Walcott*, 434 U.S. 236, 98 Sup. Ct. 549, 54 L.Ed.2d 511.

Respondent further challenges the jurisdiction of this Court to consider Petitioner's Petition for Writ of Certiorari for the reason that Petitioner did not attack the "burden of proof" required by the Texas Statutory scheme in the Court below, and, therefore, the question now alleged was never properly presented. Texas requires a "clear and convincing" standard in paternal "termination" suits, as distinguished from a "voluntary legitimation" proceeding such as Petitioner sought in the Court below, and, therefore, Petitioner's reliance upon this Court's deci-

sion in *Santosky v. Kramer*, 71 L.Ed.2d 599, is misplaced. *In Re G. M.*, 596 S.W.2d 846, 847 (Tex. 1980).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statutes involved in this case are selected provisions of Chapters 11, 12, 13 and 15 of the Texas Family Code which provisions are set forth in verbatim in the Appendix to this Brief in Opposition.

RESPONDENT'S STATEMENT OF THE CASE

The child, the subject of this suit, was born out of wedlock on January 11, 1981. It was the mother's desire to give up her parental rights to the child and to have CHRISTIAN HOMES OF ABILENE, INC. place the child for adoption. In order to place the child for adoption, Respondent, CHRISTIAN HOMES OF ABILENE, INC., a licensed child placement service, filed suit to terminate the parent-child relationship on January 15, 1981. Petitioner filed his Petition for Voluntary Legitimation on February 3, 1981, and the matter was tried to the 326th District Court of Taylor County, Texas, on August 28, 1981. Participating at the trial were the attorneys for CHRISTIAN HOMES OF ABILENE, INC., Rhodes, Doscher & Heatherly by Charles E. Myers, and the attorneys for Petitioner KIRKPATRICK, Robinson, Hanna, Moore & Holloway, Inc. by Sam Moore. The child was represented by her attorney ad litem, Malcolm Schulz, and the mother, who was a minor at the time of the hearing, was represented by her attorney ad litem, Stan Brown.

The record shows that Petitioner was 22 years of age at the time he began his clandestine meetings with the 14 year old mother, and that she was 15 at the time of

the birth of the child. (S.F. 51) Petitioner and the mother have never lived together and have never established a family relationship. Contrary to the eagerness with which Petitioner allegedly sought to assume parental responsibility, the record of the trial demonstrates that Petitioner constantly evidenced ambivalence toward the future of the child. From his first knowledge of the pregnancy until after the child was born, he expressed a desire at times to allow the child to be placed for adoption, a desire at other times to assert his rights, and a desire at yet other times to do whatever the mother of the child wanted. (S.F. 45, 124, 127, 161) His wishes concerning the future of the child were always intertwined with his desire to marry the mother (S.F. 30, 42, 43, 49, 50, 51, 144), and his position at any given time was dependent upon who had last talked with him. (S.F. 127)

The record shows that Petitioner's family had strong opinions concerning marriage and pregnancy and felt that marriage was the mandatory result of pregnancy whether or not such marriage was in the child's best interest. (S.F. 42, 82, 117, 126, 128, 145, 146)

Contrary to Petitioner's assertions that Petitioner eagerly sought to support the mother during her time of pregnancy, and likewise sought to pay her medical expenses, the record shows that Petitioner sent the mother only $70.00 while she was at CHRISTIAN HOMES (S.F. 65), and that he never offered or attempted to pay her room and board or medical bills which were in excess of $4,000.00. (S.F. 168) The payments which were ceremoniously paid to the District Clerk were begun only after the filing of his Petition for Voluntary Legitimation; were begun on the advice of his attorney, and were never received by the mother. (S.F. 80, 81)

Contrary to Petitioner's alleged eagerness to be informed of the welfare of the child, the record shows that he never sought to contact CHRISTIAN HOMES on that subject (S.F. 169), and that he never expressed any such concern in conversations with the mother after the birth of the child. (S.F. 50)

After hearing the evidence produced at trial, the trial court rendered judgment denying Petitioner's Petition for Voluntary Legitimation. The Court of Appeals for the Eleventh Supreme Judicial District of Texas affirmed the Trial Court's decision in its opinion quoted in verbatim in the Appendix to Petitioner's Petition for Writ of Certiorari at pp. A-5 through A-17. The Texas Supreme Court has denied Writ of Error.

SUMMARY OF THE ARGUMENT

The discriminatory treatment of unwed fathers, if any, is substantially related to the important state objective of promoting the best interest of children born out of wedlock and is substantially related to the achievement of that objective. Therefore, Respondent CHRISTIAN HOMES OF ABILENE, INC., contends that the "best interest of the child" standard as used in Section 13.21 of the Texas Family Code can be constitutionally applied to the class of unwed fathers when establishing their status as a parent even though all mothers and married fathers are given the status of a "parent" without application of the "best interest of the child" standard.

Respondent, CHRISTIAN HOMES OF ABILENE, INC., further contends that the "clear and convincing evidence" standard as enunciated by this Court in *Santosky*

v. Kramer,[1] is inapplicable to the facts of this case for the reason that Petitioner seeks to voluntarily establish a parental relationship. This is not a proceeding to terminate Petitioner's parental rights, and were it such a proceeding the "clear and convincing evidence" standard would have been applied in accordance with the Texas Supreme Court's decision of *In Re G. M.*[2]

Respondent further argues that Petitioner failed to properly present his argument as it relates to the "best interest of the child" standard and as it relates to the "burden of proof" in the court below.

ARGUMENT AND AUTHORITIES

Petitioner advances three alleged constitutional infirmities to the Texas Family Code. Each of Petitioner's contentions will be discussed below.

I.

Petitioner contends that the Texas Statutory scheme used to "terminate a parent-child relationship" violates due process of law for the reason that:

1. It fails to require a showing of unfitness and potential harm to the child (a showing of "potential harm" is raised by Petitioner for the first time in his Petition for Writ of Certiorari), and

2. It is unconstitutionally vague ("vagueness" is also raised for the first time by Petitioner in his Petition for Writ of Certiorari).

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1. *Santosky v. Kramer,* 71 L.Ed.2d 599.

2. *In Re G.M.*, 596 S.W.2d 846 (Tex. 1980).

Respondent alleges that Petitioner, DONALD KIRKPATRICK, has no constitutional complaint whatsoever in regards to his alleged denial of due process for the reason that this Honorable Court has previously answered the "unfitness" question in *Quillion v. Walcott*.[3] Contrary to Petitioner's contentions that his "parental rights" have been unconstitutionally "terminated", Respondent would respectfully show this Court that under the Texas Statutory scheme it is incumbent upon the unwed father to petition the appropriate Court to recognize his parental rights.[4] Petitioner, DONALD KIRKPATRICK, did so petition the 326th District Court of Texas; did fully participate at the hearing, but failed to convince that Court that it would be in the child's "best interest" to grant his petition for voluntary legitimation. Unlike *Stanley v. Illinois*,[5] *Caban v. Mohammed*,[6] and *Santosky v. Kramer*,[7]

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3. *Quillion v. Walcott*, 434 U.S. 236, 98 S.Ct. 549, 54 L.Ed. 2d 511.

4. *Id.* . . .
In *Quillion v. Walcott*, Leon Webster Quillion sought to block the adoption of his illegitimate child by the child's stepfather Ardell William Walcott. Under the Georgia law, no adoption of a child born in wedlock was permitted without the consent of each living parent. The Georgia law further provided that only the mother's consent was required if the child was illegitimate. However, the Georgia law provided a procedure whereby the unwed father could obtain veto authority over the adoption if he legitimated the child. Georgia required a finding of the child's best interest before allowing the legitimation over Mr. Quillion's objection that the state must be required to show his unfitness as a parent before denying him the veto authority of a parent. The Texas legitimation statute, § 13.21 is similar as is Petitioner KIRKPATRICK's claim of Leon Webstser Quillion.

5. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

6. *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979).

7. *Id.*, note 1.

the case presently before this Court for consideration involves an attempt to establish a parental relation rather than the termination of such a relationship or the change of a custodial status.

Petitioner KIRKPATRICK contends that the Texas Statutory scheme denies him the opportunity to establish a family relationship with his illegitimate child. Petitioner alleges that he repeatedly sought to marry and care for the mother. Petitioner alleges that he repeatedly sought to provide support for the child, to obtain custody of the child and to raise the child as his own. However, Petitioner contends that the non-existence of any family ties prevented him from establishing such a parent-child relationship. Contrary to Petitioner's assertions, Section 13.21, Texas Family Code, recited in verbatim in the Appendix of Respondent's Brief in Opposition, does provide the procedure whereby Petitioner was given the opportunity to come forward and establish the heretofore non-existent relationship.

Stanley,[8] *Caban*[9] and *Quillion*[10] all involved factual situations in which there existed a de facto parent-child relationship for the reason that in each case the unwed fathers had participated in the raising, nurturing and support of their illegitimate children. Had this case involved such a de facto relationship, in Texas there would have existed a "common law marriage"[11] relationship and it is sub-

8. *Id.*, note 5.

9. *Id.*, note 6.

10. *Id.*, note 3.

11. *Humphreys v. Humphreys*, 364 S.W.2d 177 (Tex.) Reh. denied, rev'd on other grounds.

". . . Elements of a common law marriage are: agreement presently to be husband and wife; living together as husband and

mitted by Respondent that under such circumstances and under the Texas law Petitioner would have been entitled to the rights of a parent and his rights could be terminated only by compliance with Section 15.02, Texas Family Code. However, those facts do not exist in this case, and it is submitted that under the facts as they do exist Petitioner KIRKPATRICK'S due process guarantee is adequately protected by the Texas Family Code which requires a showing of "best interest" before allowing legitimation.

Respondent excepts to Petitioner's contention that the "best interest of the child" standard is unconstitutionally vague. To the contrary, the standard employed by the Texas Family Code allows the unwed father greater flexibility to petition the appropriate Court and show that the best alternative for the child would be to allow the legitimation. The Texas Statutory scheme, although excluding unwed fathers under the statutory definition of "parent",[12] is not conclusive for the reason that it allows the unwed father a procedure wherein he can show the Court on an individualized basis that it would be in the child's best interest to recognize him as a "parent".[13] Unlike the statutes involved in *Stanley v. Illinois*[14] and *Caban v. Mohammed*[15] Petitioner was given the "opportunity to make his case" and show that he was ". . . deserving of custody of his offspring".[16]

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wife; and a holding of each other out to the public as husband and wife."

12. V.T.C.A., Family Code, Sections 11.01(3) and 12.02.
13. V.T.C.A., Family Code, Section 13.21.
14. *Id.*, note 5.
15. *Id.*, note 6.
16. *Id.*, note 5 at p. 561.

Rather than locking the unwed father into strict arbitrary standards, under the Texas Statutory scheme, he is allowed the flexibility of showing every aspect which may be in the "child's best interest". Petitioner under the Texas Statutory scheme was afforded such a right to be heard; Petitioner fully participated at the trial, but Petitioner failed to convince the Court that he should be recognized as a "parent" of Baby Girl S. Petitioner has not been denied his right to Due Process.

II.

Petitioner advances the theory that since there is a "best interest of the child" standard placed upon unwed fathers under Chapter 13 of the Texas Family Code, he has been denied equal protection under the law for the reason that Chapter 13 is allegedly sexually discriminatory. Respondent contends that the discrimination contained in Chapter 13 of the Texas Family Code, if any, can be constitutionally applied to the class of unwed fathers when establishing their status as a parent even though, under the Texas Statutory scheme, all mothers and married fathers are given the status of a "parent" without application of the "best interest of the child" standard for the reason that such discriminatory treatment, if any, is substantially related to the important State objective of promoting the best interest of children born out of wedlock and is substantially related to the achievement of that objective.[17]

Stanley[18] does not decree that all unwed fathers have fundamental rights to full parental status or that every statutory discrimination against the unwed father is sus-

17. *Craig v. Boren*, 429 U.S. 190 (1976).

18. *Id.*, note 5.

pect. The overriding interest of the State and the Courts is the welfare of the affected children.[19] Nor does the Equal Protection Clause mandate that all biological fathers be treated equally.[20] If the distinction is created to achieve the promotion of the legitimate State interest, i.e. the welfare of illegitimate children, the distinction is not unconstitutional.[21]

Respondent contends that the State has an interest in protecting children conceived and born out of wedlock, and relies upon the rationale expressed by the Texas Supreme Court in its opinion in *In the Interest of T.E.T.*[22] Who could better show that the child's best interests would be served by allowing the unwed father the status of a parent than the unwed father seeking that status? It is therefore submitted that rather than placing an unconstitutional burden upon Petitioner, the Texas Statutory scheme allows Petitioner the means whereby he can show the merits of his pursued status.

This Court's opinion in *Caban v. Mohammed*[23] is distinguishable from the present case now before the Court. In *Caban* this Court held unconstitutional a New York

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19. *In the Interest of K.*, 535 S.W.2d 168 (Tex.), Cert. denied 429 U.S. 907, Reh. denied, 429 U.S. 1010 (1976).

20. *Id.*, note 3.

21. *Id.*, note 6.

22. *In the Interest of T.E.T.*, 603 S.W.2d 793 (Tex.) *Cert. denied* 450 U.S. 1025.

> "The State has a valid objective in requiring the biological father to establish his "status" as a parent. Otherwise, we would recognize a sperm donor, a rapist, a hit and run lover, an adulterer and the like in the same legal status as a father who had accepted the legal and moral commitment to his family."

23. *Id.*, note 6.

statute that granted an unwed mother the authority to block the adoption of her child simply by withholding her consent, but did not give an unwed father a similar right. Nor did the New York statute provide a procedure whereby the unwed father could attain the status of a parent by legitimating his children. The Petitioner urges this Court to hold unconstitutional portions of the Texas Family Code based upon the rationale set forth in the *Caban* decision.

It is submitted by Respondent that the decision reached by this Court in *Caban* is limited to the circumstances of that case wherein the natural father had established a family relationship with his children and had previously participated in the rearing of the children.[24] Petitioner KIRKPATRICK had not established such a relationship, had not participated in the child's rearing nor had he participated in the daily supervision, education, protection or care of the child.

Chapter 13 of the Texas Family Code provides a procedure which allows the unwed father to show on an

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24. *Id.*, note 22.
The Texas Supreme Court stated in *In the Interest of T.E.T.*,
". . . the Court made it clear that its *Caban* opinion must be read in the light of the unusual circumstances of the case. There the unmarried parents had lived together for five years as husband and wife, during which period two children were born to them. They then separated and the mother married Mohammed. Eventually Mohammed sought to adopt the children with the mother's consent. The facts of the *Caban* case illustrated the injustice of that discrimination as applied to parents who have lived as a family unit for years. . . .
The *Caban* Court carefully pointed out that appropriately limited distinctions between the rights of the mother and rights of the father are not necessarily improper."

individualized basis the merits of his action while at the same time balancing the compelling State interest in the welfare of illegitimate children. If all unwed fathers were given the status of a "parent" the State would be required to petition the Court in each and every case without regard to the concern or lack of concern of the alleged father and would be required to prove "by clear and convincing evidence" that the unwed father "parent" had committed one or more of the acts or omissions contained in § 15.02 of the Texas Family Code before the illegitimate child could be placed in a suitable home for adoption. Respondent does not take the position that all unmarried fathers are unsuitable to be considered parents. However, because of the sheer number of illegitimate births, it would disserve the interest of the State and the illegitimate child if the State were required to follow the procedure advocated by Petitioner. On the other hand, the procedure employed by Texas in voluntary legitimacy cases adequately allows the procedural safeguards mandated by the United States Constitution and is not constitutionally infirm merely because fathers of illegitimate children are treated differently as a class than are unwed mothers and married fathers for the reason that the distinction is related to the achievement of a valid State interest.

Petitioner also advances the argument that the Texas Statutory scheme unconstitutionally discriminates against illegitimate children. Respondent would first show unto this Court that Petitioner lacks standing to advance any claim on behalf of Baby Girl S. or on behalf of illegitimate children in general. There has been no appeal on behalf of Baby Girl S. from the decision of the District Court.

Baby Girl S. was represented at the Trial Court by her attorney ad litem who fully participated at the hearing. Petitioner has failed until now to assert any constitutional claim on behalf of Baby Girl S. or on behalf of illegitimate children in general, and he is, therefore, precluded from doing so now.

Furthermore, *Gomez v. Perez*[25] is inapplicable to the case now before this Court. The *Gomez* decision addressed itself to the right of a child for support. Texas recognizes the child's right for support and provides the procedure for the implementation of that right. Sections 13.01 through 13.09, Texas Family Code, recited in verbatim in the Appendix to Respondent's Brief in Opposition.

Even if Petitioner's contentions as they are addressed to the alleged rights of illegitimate children were in any way meritorious, those merits would be outweighed by the prevailing State interest concerning the welfare of illegitimate children. Were Petitioner's contention worthy of consideration, every legitimate child would be required to remain in a state of "limbo" until such time as he or she reached majority.

It is submitted by Respondent that the prevailing State interest, as well as the child's interest, balances any alleged discrimination directed to the unwed father under the Texas Statutory scheme and for that reason, Petitioner has not been denied his constitutionally protected right under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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25. *Gomez v. Perez*, 409 U.S. 535, 34 L.Ed.2d 56, 93 Sup. Ct. 872 (1973).

III.

Petitioner contends that the Texas Statutory scheme employs an improper standard of proof and wrongfully places the burden of proof on the "parent who is the target of the termination proceeding" contrary to this Court's decision in *Santosky v. Kramer*.[26] Respondent alleges that Petitioner KIRKPATRICK has no constitutional complaint whatsoever in regard to *Santosky*. *Santosky* involved a New York statute that allowed the termination of parental rights upon a finding of the child's "permanent neglect", and further required such a finding upon a "fair preponderance of the evidence". This Court held that the standard employed by New York was inadequate for the reason that the preponderance standard did not adequately convey to the fact finder the level of subjective certainty about his factual conclusions necessary to satisfy due proces. This Court reasoned that since the private interest, i.e. the termination of parent-child relationships is "commanding and the threatened loss is permanent", a preponderance standard does not "fairly allocate the risk of an erroneous fact finding between the State and the natural parents".[27]

Petitioner's suit was one to "establish his parental rights" as opposed to a suit to "terminate his parental rights". The rationale in *Santosky* is, therefore, not applicable. Had there been a family relationship in existence, the "clear and convincing evidence" standard enunciated by *Santosky* would be applicable to this case and would have been required by the Texas Courts pursuant to the

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26. *Id.*, note 1.

27. *Id.*

Texas Supreme Court's decision in *In Re G. M.*[28] However, since Petitioner sought to "establish his parental rights" the requirements of the Texas Statutory scheme requiring him to show such relationship to be in the "child's best interest" does not violate the rationale of *Santosky v. Kramer*.

Not only does Petitioner attack the standard of proof employed by the Texas Statutes, but Petitioner also contends that the Burden of Proof is wrongfully placed on him. Petitioner contends that it should be the State's burden to come forward and prove that he should not be allowed to attain the status of "parent". However, Petitioner fails to recognize the State's interest as well as the rationale of *Stanley*[29] wherein this Court held that Stanley was denied due process by the Illinois statute which denied him the right to come forward and show that he was worthy of parentage. The Burden of Proof employed by Texas adequately protects Petitioner's constitutionally protected rights.

CONCLUSION AND PRAYER

In conclusion, Respondent would submit that § 13.21 of the Texas Family Code is not constitutionally infirm and further that this Court should not accept jurisdiction of this case for the reasons that the questions alleged by Petitioner here were either not properly presented below or have been addressed and answered by this Court in previous decisions.

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28. *Id.*, note 2.

29. *Id.*, note 5.

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Respondent respectfully submits that the Petition for Writ of Certiorari be denied and that Petitioner be ordered to pay all costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of Respondent's Brief In Opposition On Petition For Writ Of Certiorari to the United States Supreme Court has been mailed to BURT NEUBORNE, Attorney for Petitioner, American Civil Liberties Union Foundation, 132 W. 43rd Street, New York, New York 10036, postage prepaid, return receipt requested on the _____ day of November, 1982.

CHARLES E. MYERS

APPENDIX

TEXAS FAMILY CODE

Section 11.01. Definitions

As used in this subtitle and Subtitle C of this title,[1] unless the context requires a different definition:

(1) "Child" or "minor" means a person under 18 years of age who is not and has not been married or who has not had his disabilities of minority removed for general purposes. "Adult" means any other person.

(2) "Court" means the district court, court of domestic relations, juvenile court having the jurisdiction of a district court, or other court expressly given jurisdiction of a suit under this subtitle.

(3) "Parent" means the mother, a man as to whom the child is legitimate, or an adoptive mother or father, but does not include a parent as to whom the parent-child relationship has been terminated.

(4) "Parent-child relationship" means the rights, privileges, duties, and powers existing between a parent and child as provided by Section 12.04 of this code.

(5) "Suit affecting the parent-child relationship" means a suit brought under this subtitle in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is sought.

(7) "Authorized agency" means a public social agency authorized to care for children or to place children for adoption, or a private association, corporation, or person approved for that purpose by the Texas Department of Human Resources through a license, certification, or other means.

(8) "Illegitimate child" means a child who is not and has never been the legitimate child of a man and whose parent-child relationship with its natural mother has not been terminated by a court decree.

(9) "Governmental entity" means the state, a political subdivision of the state, or an agency of the state.

Section 12.02. Relation of Child to Father

(a) A child is the legitimate child of his father if the child is born or conceived before or during the marriage of his father and mother.

(b) A child is the legitimate child of his father if at any time his mother and father have attempted to marry in apparent compliance with the laws of this state or another state or nation, although the attempted marriage is or might be declared void, and the child is born or conceived before or during the attempted marriage.

(c) A child is the legitimate child of a man if the man's paternity is established under the provisions of Chapter 13 of this code.[1]

Section 13.01. Time Limitation of Suit

A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the

child's natural father by proof of paternity must be brought before the child is four years old, or the suit is barred.

Section 13.02. Pretrial Proceedings: Blood Tests

(a) When the respondent appears in a paternity suit, the court shall order the mother, alleged father, and child to submit to the taking of blood for the purpose of one or more blood tests. If the appearance is before the birth of the child, the court shall order the taking of blood to be made as soon as medically practical after the birth.

(b) An order issued under this section is enforceable by contempt, except that if the petitioner is the mother or the alleged father and refuses to submit to the blood test, the court shall dismiss the suit. If the respondent is the mother or the alleged father and refuses to submit to the blood test, the fact of refusal may be introduced as evidence as provided in Section 13.06(d) of this code.

Section 13.03. Pretrial Proceedings: Appointment of Experts

(a) The court may appoint one or more experts qualified as examiners of blood types to make the blood tests. The court may determine the number and qualifications of the experts and shall prescribe the arrangements for conducting the tests.

(b) The court may fix a reasonable fee for each court-appointed examiner and may require the fee to be paid by any or all of the parties or by the Texas Department of Human Resources, if the department is a party of the suit, in the amounts and in the manner directed, or the

court may tax all or part or none of the fee as costs in the suit.

(c) A party may employ other qualified examiners of blood tests. The court may order blood samples made available to these examiners if requested.

Section 13.04. Pretrial Proceedings: Conference

(a) After completion of the blood tests, the court shall order all parties to appear, either in person or by counsel, at a pretrial conference. The court shall call its appointed examiners to testify in person or by deposition about their tests and findings. A party may call other qualified examiners of blood tests to testify.

(b) Witnesses called by the court are the court's witnesses, and witnesses called by a party are that party's witnesses. The court and the parties may examine and cross-examine all witnesses.

(c) All evidence presented at the pretrial conference is a part of the record of the case.

Section 13.05. Pretrial Proceedings: Effect of Blood Tests

(a) At the conclusion of the pretrial conference, if the court finds that the tests show by clear and convincing evidence that the alleged father is not the father of the child, the court shall dismiss the suit with prejudice.

(b) If the court finds that the blood tests fail to show by clear and convincing evidence the alleged father is not the father of the child, the court shall set the suit for trial.

Section 13.06. Evidence at Trial

(a) Unless otherwise permitted by the court on a showing of good cause, a party may call to testify on the results of the blood tests only those experts who testified at the pretrial conference.

(b) A witness called by a party at the trial is that party's witness.

(c) If the blood tests show the possibility of the alleged father's paternity, the court may admit this evidence if offered at the trial.

(d) Evidence of a refusal by the respondent to submit to a blood test is admissible to show only that the alleged father is not precluded from being the father of the child.

Section 13.07. Settlement

The child must be a party to a settlement agreement with the alleged father. The child shall be represented in the settlement agreement by a guardian ad litem appointed by the court. The court must approve any settlement agreement, dismissal, or nonsuit.

Section 13.08. Decree

(a) On a verdict of the jury, or on a finding of the court if there is no jury, that the alleged father is the father of the child, the court shall issue an order designating the alleged father as the father of the child.

(b) On a verdict of the jury, or on a finding of the court if there is no jury, that the alleged father is not the father of the child, the court shall issue an order declaring this finding.

Section 13.09. Effect of Decree Establishing Paternity

The effect of a decree designating the alleged father as the father of the child is to create the parent-child relationship between the father and the child as if the child were born to the father and mother during marriage.

Section 13.21. Voluntary Legitimation

(a) If a statement of paternity has been executed by the father of an illegitimate child, the father or mother of the child or the Texas Department of Human Resources may file a petition for a decree designating the father as a parent of the child. The statement of paternity must be attached to the petition.

(b) The court shall enter a decree designating the child as the legitimate child of its father and the father as a parent of the child if the court finds that:

(1) the parent-child relationship between the child and its original mother has not been terminated by a decree of a court;

(2) the statement of paternity was executed as provided in this chapter, and the facts stated therein are true; and

(3) the mother or the managing conservator, if any, has consented to the decree.

(c) The requirement of consent of the mother is satisfied if she is the petitioner. If the entry of the decree is in the best interest of the child, the court may consent to the legitimation of the child in lieu of the consent of the mother or managing conservator.

(d) A suit for voluntary legitimation may be joined with a suit for termination under Chapter 15 of this code.[1]

(e) A suit under this section may be instituted at any time.

Section 15.02. Involuntary Termination of Parental Rights

A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:

(1) the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return; or

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months; or

(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months; or

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; or

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct

which endangers the physical or emotional well-being of the child; or

(F) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition; or

(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence; or

(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth; or

(I) contumaciously refused to submit to a reasonable and lawful order of a court under Section 34.05 of this code; or

(J) been the major cause of:

(i) the failure of the child to be enrolled in school as required by the Texas Education Code; or

(ii) the child's absence from his home without the consent of his parents or guardian for a substantial length of time or without the intent to return; or

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by Section 15.03 of this code; and in addition, the court further finds that

(2) termination is in the best interest of the child.

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FILED
DEC 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DONALD J. KIRKPATRICK,

Petitioner,

—v.—

CHRISTIAN HOMES OF ABILENE, INC., and the 326th DISTRICT COURT OF TAYLOR COUNTY, TEXAS,

Respondents.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

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NO. 82-647

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

DONALD J. KIRKPATRICK,
Petitioner,

v.

CHRISTIAN HOMES OF ABILENE, INC., and the 326th DISTRICT COURT OF TAYLOR COUNTY, TEXAS,
Respondents.

On Appeal From The
Supreme Court Of The State Of Texas

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

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1. Respondent's Brief in Opposition to Petition for Certiorari rests on a single, entirely mistaken premise: that Texas law can ignore the basic biological relationship between petitioner and his daughter by refusing to grant him the legal status of "parent," and then define his rights to their relationship in terms of

the lesser status Texas has chosen to accord him. The Court, however, has already soundly rejected precisely this line of reasoning in another parental termination case:

> To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a state to draw such 'legal' lines as it chooses.

Stanley v. Illinois, 405 U.S. 645, 652 (1972) (citation omitted). The reason for respondent's effort to "avoid the issue" in this matter by insisting that this is a legitimation, rather than a termination, proceeding is readily apparent: a termination proceeding requiring a "parent" to shoulder the burden of proof, or to face termination of parental rights on the basis of a vague "best

interests of the child" standard,*/ would plainly offend the Constitution, Santosky v. Kramer, ___ U.S. ___, 102 S.Ct. 1338, 71 L.Ed.2d 599 (1982).

2. Respondent also attempts to cloud the clearly presented legal questions raised by this case with selective and misleading "statements of fact."

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*/ Respondent's assertion that the due process issues were not sufficiently raised below is mistaken. In the Texas Court of Civil Appeals, petitioner explicitly attacked the differential standard applied to out-of-wedlock fathers on grounds of equal protection and argued that the "best interest of the child" standard violated due process. Brief for Appellant, Texas Court of Civil Appeals, at 14-20. His application for a Writ of Error to the Texas Supreme Court, which was denied, explicitly assigned as error that the provision at issue here "is unconstitutional in that it violates the Equal Protection and Due Process clause of the Fourteenth Amendment to the United States Constitution." Application for a Writ of Error at 4.

Despite respondent's insinuations to the contrary, however, a careful reading of the record below will reveal that any ambivalence petitioner may ever have experienced concerning the future of his daughter vanished promptly upon her birth. Since the time of her birth, he has been steadfast in his desire to support and to raise her in his family's home, despite the fact that the maternal grandparents have impeded his ability to develop a personal relationship with her by sending the baby's mother to another jurisdiction a thousand miles away. As the record shows, petitioner not only hired an out-of-state lawyer to represent him, but, together with his parents, travelled from Nebraska to Texas to corroborate at trial the court-appointed social worker's report that he could provide his daughter with an adequate and caring home.

In view of petitioner's consistent demonstration of a desire to care for his daughter from the moment she was born, and the acknowledgement by all concerned that he is indeed her father, it is hardly surprising that respondents have felt compelled to resort, in their Brief in Opposition, to the circular reasoning already rejected by the Court in Stanley v. Illinois, supra. There is, however, no more reason for the Court to countenance those arguments in this case than there was in Stanley.

The Constitution precludes the state from permanently severing the bond between a child and a loving and willing biological parent in the absence of a specific showing of parental unfitness. It also precludes the state from imposing a different substantive standard on out-of-wedlock fathers from that imposed on all other parents. The Court

should grant certiorari because this case presents an appropriate occasion to establish those fundamental principles.

Respecfully submitted,

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—v.—

CHRISTIAN HOMES OF ABILENE, INC., and the 326th DISTRICT COURT OF TAYLOR COUNTY, TEXAS,

Respondents.

ON WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. May Texas terminate the parent-child relationship between a concerned and competent parent and his infant out-of-wedlock daughter without demonstrating either parental unfitness or any potential harm to the child pursuant to the conclusory standard of "best interests of the child?"

2.a. May Texas apply an unfitness standard to termination proceedings involving both in-wedlock fathers and out-of-wedlock mothers, but apply a "best interests of the child" standard in termination proceedings involving out-of-wedlock fathers seeking to fulfill their parental responsibilities?

b. Does such differentiation represent unconstitutional discrimination on the basis of illegitimacy and gender?

3. May Texas require an out-of-wedlock father to satisfy a burden of proving that his child's best interests would be served by recognizing him as a "legal" as well as a biological father?

THE PARTIES

The parties to this proceeding are listed in the caption. Throughout these proceedings, the child in question has been referred to as Baby Girl S.

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OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals is reported at 628 S.W.2d 261 (Tex. Ct. App. 1982). The Texas Supreme Court denied review without issuing an opinion. The opinion of the Court of Civil Appeals as well as the Texas Supreme Court's orders denying a writ of error and denying rehearing are set forth in the Appendix to the Petition for Writ of Certiorari and the Joint Appendix filed in conjunction with this brief.

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. §1257(3) to review an order of the Supreme Court of Texas entered July 14, 1982, denying rehearing of an order

denying a writ of error entered June 16, 1982. A Writ of Certiorari was issued on January 17, 1983.

CONSTITUTIONAL PROVISION

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

Texas Family Code §13.21. Voluntary Legitimation.

(a) If a statement of paternity has been executed by the father of an illegitimate child, the father or mother of the child or the Texas Department of Human Resources may file a petition for a decree designating the father as a parent of the child. The statement of paternity must be attached to the petition.

(b) The court shall enter a decree designating the child as the legitimate child of its father and the father as a parent of the child if the court finds that:

(1) the parent-child relationship between the child and its original mother has not been terminated by a decree of a court;

(2) the statement of paternity was executed as provided in this chapter, and the facts stated therein are true; and

(3) the mother or the managing conservator, if any, has consented to the decree.

(c) The requirement of consent of the mother is satisfied if she is the petitioner. If the entry of the decree is in the best interest of the child, the court may consent to the legitimation of the child in lieu of the consent of the mother or managing conservator.

(d) A suit for voluntary legitimation may be joined with a suit for termination under Chapter 15 of this code.

(e) A suit under this section may be instituted at any time.

STATEMENT OF THE CASE

In Texas, a "parent" may not be involuntarily deprived of parental rights absent a showing of unfitness, or neglect or abandonment[1] made by clear and convincing evidence[2] at a hearing on written notice.[3] Once parental rights are terminated and a managing conservator appointed, the parent's legal relationship to the child is totally extinguished;[4] the parent has no right ever to see the child again or to object to the child's adoption by anyone else.

1/ Texas Fam. Code §15.02(1).

2/ In re G.M., 596 S.W.2d 846 (Tex. 1980).

3/ Texas Fam. Code §11.07.

4/ The child retains the right to inherit from or through its divested parent unless the court orders otherwise. Texas Fam. Code §15.07.

Texas law defines "parent" to include the father or mother of a child born of a legal marriage, the mother of a child born out-of-wedlock, and the father of a child born out-of-wedlock with regard to whom a court has entered an order of legitimation. Texas Fam. Code §11.01(3). Legitimation can take place one of two ways: a proceeding may be brought against a recalcitrant father to establish the father's obligation to support the child,[1] or the father himself may initiate the proceeding.[2] If the child's mother objects to the petition for legitimation it will be denied unless the court find that it is in the best interest of the child that the petition be granted.[3]

1/ Texas Fam. Code §13.08.

2/ Texas Fam. Code §13.21.

3/ Texas Fam. Code §13.21(c).

Absent a judicial declaration of legitimation the father of an out-of-wedlock child in Texas is not that child's legal parent, unlike the mother of an out-of-wedlock child and the mother and father of a child born in wedlock.

Petitioner Donald Kirkpatrick is the father of a little girl who is now two years old and is known to him only as Baby Girl S.[1/] Mr. Kirkpatrick and the child's mother, R.L.S., a friend of one of Mr. Kirkpatrick's sisters (Joint Appendix, "J. A.," at 155a) began a serious relationship, during which marriage was discussed (J.A. at 157a, 189a-190a), about a year-and-a-

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1/ Because of the sensitive privacy interests involved in this case, and because the record below was sealed, petitioner will refer to the child, her mother, and her mother's parents, by initials in this memorandum. See Note, Joint Appendix, at iii.

half before the child was conceived (J.A. at 118a). Both of them lived in York, Nebraska, where Mr. Kirkpatrick worked on his father's farm.

When Mr. Kirkpatrick learned that Ms. S. was pregnant, he asked her to marry him (J.A. at 190a, 204a). His parents encouraged the marriage, and offered their support (J.A. at 160a, 272a, 286a - 287a) but the parents of the young woman refused to give their consent (J.A. at 284a, 314a).

Instead, Ms. S. was sent by her parents to a maternity residence operated by respondent Christian Homes of Abilene in Abilene, Texas. Mr. Kirkpatrick offered to pay the cost of Ms. S.' care, but the offer was refused (J.A. at 224a-225a). During the time she was in the maternity home Mr. Kirkpatrick corresponded with Ms. S. regu-

larly (J.A. at 130a) and sent her money on occasion, as did Mr. Kirkpatrick's father (J.A. at 190a-191a, 194a).

During this period, Ms. S. tried to persuade Mr. Kirkpatrick to agree to have their baby placed for adoption. Mr. Kirkpatrick wavered, based on his love for Ms. S. (J.A. at 163a, 199a, 205a-206a), but decided that he could not agree to relinquish his rights to his child, notwithstanding the fact that Ms. S. was surrendering the child for adoption and had implored him to do the same. He testified as to his reason:

> Because I love my daughter, too. I couldn't let her go, too. I had to try and get her. She's my blood, and I just couldn't let her go. I want her. She's part of me, and I just got to have her.

(J.A. at 207a).

Within a month after the child was

born, Mr. Kirkpatrick began paying a hundred dollars a month into court for the child's support (J.A. at 105a-106a). On August 28, 1981, a hearing was held in district court in Taylor County, Texas, on a petition to terminate the parent-child relationship of R.L.S., brought by the Christian Homes of Abilene, and on the cross-petition of Donald Kirkpatrick for the legitimation of his daughter (J.A. at 95a-383a). At the hearing, it was stipulated by all parties that Mr. Kirkpatrick is the biological father of the child (J.A. at 106a). Ms. S.' affidavit of relinquishment of parental rights was presented to the court and she testified that she wanted Christian Homes of Abilene appointed as managing conservator so that the child could be placed in an adoptive home selected by Christian Homes.

Ms. S. also testified that she would not consent to Mr. Kirkpatrick's petition for legitimation. She stated she was opposed to Mr. Kirkpatrick's assuming custody of their daughter and that she preferred that the child be placed in a two-parent Christian family chosen by respondent because Mr. Kirkpatrick would be a single parent (J.A. at 142a-143a), would have to rely on his parents for assistance in raising the child (J.A. at 144a), she did not like the atmosphere in the elder Kirkpatricks' home (J.A. at 144a) and because Mr. Kirkpatrick might not believe in God (J.A. at 146a-147a) and smokes.[1/] She also testified

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1/ The court also learned that Mr. Kirkpatrick has epilepsy which is controlled by medication (J.A. at 255a).

Q. In your letters, R., you refer to him as being a most wonderful man, handsome, a good man, a hard worker.

A. He still is. He has good qualities, too.

(J.A. at 191a).

The court also heard testimony from petitioner's parents, Mr. and Mrs. Kirkpatrick, and from Ms. S.' parents. Each set of parents testified to why they believed it was appropriate either for their child to seek custody of the child,[1] or to surrender the child for adoption.[2] Ms. S.

1/ Mrs. Kirkpatrick testified, "[I]t's his daughter . . . . For us it's our grandchild, and we like to take care of our own. That's the way we always have been in our family." (J.A. at 252a).

2/ Mrs. S. tesified, "[A]dolescents make poor mothers . . . .[I]t's just not a time for motherhood."(J.A. at 293a) "I want my grandchild to have the best possible home
(footnote continued next page)

and her parents testified that they wanted the child raised in a "two parent Christian family." (J.A. at 151a, 177a, 323a). Two representatives of Christian Homes also testified. Nancy Miller, the executive director, testified about one conversation with Mr. Kirkpatrick, three days after his daughter had been born, in which he expressed both his love for the baby,[1/] and his uncertainty about what the right course of action would be. Jo Griffin, an adoption caseworker at Christian

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(footnote continued from previous page) that she can have." (J.A. at 295a-296a). Mr. S. testified that it would be "an impossible situation" if the child were brought back to their small community and that, therefore, his family might move (J. A. at 327a).

1/ "He was disturbed and upset . . . [H]e told me that he cared for R. and that he cared about the baby, but he wanted to do the right thing . . . . I told him that we realized that he cared about R. and that he cared about the baby and he had shown an interest in her . . . (J.A. at 341a, 343a, 344a).

Homes, testified briefly about Ms. S.' voluntary relinquishment of her parental rights.

The court also had before it a home-study on Mr. Kirkpatrick that concluded

> In my judgment, Mr. Kirkpatrick could adequately provide for his daughter's emotional, physical and financial needs should the Court grant him custody of his daughter . . .

(J.A. at 395a).

On the record, the trial judge commented

> I think that this young man here is doing a good job with his life. He is apparently working hard on that farm, and he is going to make something of himself . . . .
>
> The Court finds that this young man here would, in fact, be a proper person to have parental rights under perhaps other circumstances . . .

(J.A. at 379a).

Nevertheless, the court denied the petition for legitimation. The sole basis for doing so, contained in the court's Findings of Fact (J.A. at 85a) was

> It is not in the best interest of the child for this court to consent to the legitimation of the child by the Respondent Cross-Petitioner Donald J. Kirkpatrick.

A motion for additional findings of fact was filed by Mr. Kirkpatrick and denied by the court. (J.A. at 93a, 94a).

On appeal, the Texas Court of Civil Appeals found, inter alia, that the lower court had not abused its discretion in denying legitimation based on the best interest of the child, pursuant to Texas Fam. Code Ann. §13.21, and rejected petitioner's contention that §13.21 violates the equal

protection and due process clauses of the Fourteenth Amendment. An application for a writ of error to the Texas Supreme Court was denied, as was a motion for rehearing in that court.

On January 17, 1983, the United States Supreme Court granted Mr. Kirkpatrick's petition for a writ of certiorari.[1/]

1/Petitioner, through his attorney, has attempted to learn the present circumstances under which his daughter is living. He has been advised by counsel for respondent that the child has not been adopted, and that respondent does not wish to provide any additional information.

Petitioner's own circumstances have changed since the decision of the Texas court. In March, 1982, Mr. Kirkpatrick married. He and his wife are in the process of buying their own home and are expecting a child in July. Mrs. Kirkpatrick is a full-time homemaker and joins in her husband's desire to raise his daughter.

SUMMARY OF ARGUMENT

There can be no dispute that the relationship between parent and child involves the most fundamental of rights, which this Court has accorded the highest level of constitutional protection. Prince v. Massachusetts, 321 U.S. 158 (1944); Santosky v. Kramer, 455 U.S. 745, 71 L.Ed.2d 599 (1982). When the state seeks to disrupt that relationship, it must do so only for the most compelling of reasons and then only in a manner which provides the parent with the procedural and substantive protections guaranteed by the due process clause. Santosky v. Kramer, supra; Lassiter v. Department of Social Services, 452 U.S. 18 (1981); Stanley v. Illinois, 405 U.S. 645 (1972) It must also do so in a non-discriminatory manner, so as not to deprive a parent of the equal protec-

tion of the laws, Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, supra.

Petitioner, a competent and caring parent has been deprived of his right to raise his young daughter, and his daughter has been freed for adoption by strangers, solely because petitioner has been unable to convince a court that it is in his child's "best interest" to be raised by her father rather than adopted into an unknown "two parent Christian family." The use of a "best interest" standard to terminate the parent-child relationship, a standard which is inherently vague and which invites subjective and arbitrary decision-making, cannot be justified by any state interest in the well-being of children and violates petitioner's substantive due process rights. In addition, the use of such a vague stan-

dard, and the imposition of the burden of proof on petitioner, violates petitioner's procedural due process rights. Smith v. Goguen, 415 U.S. 566 (1974); Santosky v. Kramer, supra;

This vague and subjective best interest standard is applicable in Texas only to the fathers of out-of-wedlock children; all other parents can have their parental rights terminated only upon proof of unfitness, abandonment or harm to the child. Thus, the Texas statute impermissibly discriminates both on the basis of gender and illegitimacy without any compelling or substantial necessity for doing so. Caban v. Mohammed, supra; Stanley v. Illinois, supra; Mills v. Habluetzel; __ U.S. __, 71 L.Ed.2d 770 (1982).

ARGUMENT

I.

THE DECISION TO TERMINATE THE PARENTAL RELATIONSHIP BETWEEN PETITIONER AND HIS DAUGHTER PURSUANT TO TEXAS FAMILY CODE §13.21 DEPRIVED PETITIONER OF SUBSTANTIVE DUE PROCESS OF LAW; AND PROCEDURAL DUE PROCESS OF LAW.

A. Introductory Statement

In this case, Texas has severed the parental relationship between a loving and concerned father, anxious and competent to assume parental responsibilities, and his out-of-wedlock daughter solely because the father failed to persuade a judge that it would be in the "best interest" of the child to be raised by him as opposed to unknown adoptive parents. Although called a legitimation and not a termination proceeding the effect is the same: Petitioner has been totally deprived of his parental rights without any showing that a need exists for the state

to take so drastic a step and pursuant to a standard of such vagueness that it constitutes an invitation to arbitrary and subjective decision-making.

This court has never upheld any statute that countenanced the extinction of the bond between parent and child where, as in the present case, the parent was competent and eager to raise his child and where the parent-child relationship was being severed so the child could be adopted by strangers. The destruction of a parent-child relationship by the state in the absence of a factual finding of need pursuant to a vague and wholly subjective "best interest" standard which imposes the persuasion burden on the parent cannot withstand any level of constitutional scrutiny.[1/]

1/ The use of a vague and imprecise "best
(footnote continued on following page)

B. The Constitutionally Protected Nature of the Parent-Child Relationship

The Court has long recognized that the parent-child bond is of such fundamental importance to the fabric of our society that government may intrude upon it only when the state asserts a powerful justification and then only in the least intrusive manner pursuant to carefully delineated procedural safeguards. See, e.g., Santosky v. Kramer, 455 U.S. 745, 71 L.Ed.2d 599 (1982); Armstrong v. Manzo, 380 U.S. 545

(footnote continued from previous page) interest" standard to deprive fathers of out-of-wedlock children of their parental rights, while applying a higher substantive termination standard to other parents, also deprives petitioner of the equal protection of the laws. See Point II, infra.

(1965); Moore v. East Cleveland, 431 U.S. 494 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Parham v. J.R., 442 U.S. 584 (1979); Zablocki v. Redhail, 434 U.S. 374 (1978); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1978); Prince v. Massachusetts, 321 U.S. 158 (1944); Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 388 U.S. 1 (1967). Pierce v. Society of Sisters, 268 U.S. 510 (1925).1/ This special level of constitutional protection has not been limited to the bonds uniting the traditional two-parent family but has protected less

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1/ Representative examples of this Court's recognition of the constitutionally protected nature of the parent-child relationship include:

> The absence of dispute concerning the fundamental nature of the parent-child bond reflect(s) this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.

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conventional family units as well, specifically including fathers and their out-of-wedlock children. See, e.g., Stanley v. Illinois, supra; Caban v. Mohammed, 441 U.S. 380 (1979); Moore v. East Cleveland, supra.

As a preliminary matter, it is, of course, clear that the parent-child bond which merits constitutional protection is a matter of biological and psychological fact wholly independent of the artificial

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(footnote continued from previous page) Santosky v. Kramer, supra at 753 [citations omitted]

> The importance of the parent-child relationship is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural. Moore v. East Cleveland, 431 U.S. 494, 503 (1972). [fn. omitted]

In short, the parent-child relationship is an "intrinsic human right," Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977), antedating not only the constitution, but organized society as a whole. See also Griswold v. Connecticut, 381 U.S. 479 (1965).

"legal" labels which may be assigned to a given parent under state law. As this Court noted in Stanley v. Illinois:

> To say that the test of equal protection should be the legal rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a state to draw such 'legal' lines as it chooses. 405 U.S. 645, 652 (1972) [citation omitted].

In the instant case, whether or not Texas chooses to recognize petitioner as a "legal" parent, his biological parentage is conceded by all. Accordingly, the constitutional question of whether that biological parentage may be declared a nullity by Texas cannot be avoided by a circular exercise in semantics.

On the other hand, the constitutional protection afforded the parental relationship has been pragmatically tailored to assure that technical assertions of biological parental status do not frustrate

the ability of a child to enjoy a stable and loving home. For example, if the state demonstrates that a biological parent is unfit, the state may have both a right and a duty to terminate the parental relationship. Similarly, if a biological parent fails to come forward to take responsibility for the care and nurturing of a child, the state may have both a right and a duty to provide such a child with a permanent, stable and loving home notwithstanding the nominal status of the defaulting biological parent. See Quilloin v. Walcott, 434 U.S. 246 (1978).1/ Thus, in Caban, this Court

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1/ The Court in Quilloin affirmed what amounted to the termination of parental rights of an unwed father who, in contrast to petitioner, had never sought actual or legal custody of his child but who merely sought to block legal recognition of what was a de facto family unit. The Court cautioned:

We have little doubt that the Due
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noted:

> In those cases where the father never has come forward to participate in the rearing of a child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child. 441 U.S. at 392.

Where, however, a biological parent does immediately come forward to rear his child and where no affirmative objection to his parental fitness exists, the parent-child bond is insulated against state interference by three interrelated sets of constitutional protections: First, the substantive protection afforded by the Due

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> Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interests."

Quilloin v. Walcott, supra, at 255.

Process Clause prohibits the state from extinguishing the parent-child bond in the absence of a factually-based showing of unfitness, abandonment or likelihood of harm to the child;[1] second, the procedural protections afforded by the Due Process Clause prohibit the state from extinguishing the parent-child bond pursuant to vague and conclusory standards;[2] and third, the

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1/ For the use of substantive due process to protect the family unit against undue state interference, see, e.g. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Moore v. East Cleveland, 431 U.S. 494 (1972). See also, Loving v. Virginia, 388 U.S. 1 (1967); Wisconsin v. Yoder, 406 U.S. 205 (1972).

2/ This Court has also ruled that procedural due process of law in the context of an involuntary termination of the parent-child bond requires notice and a hearing, appointed counsel when necessary and a clear and a convincing showing by the state. See Stanley v. Illinois, supra; Lassiter v. Dept. of Social Services, 452 U.S. 18 (1981); Santosky v. Kramer, supra; Armstrong v. Manzo, supra.

protection afforded by the Equal Protection Clause forbids the state from applying differential standards for termination on the basis of sexual stereotyping or sterotyping associated with out-of-wedlock birth.[1/]

In seeking to extinguish the parental bond between petitioner and his daughter, Texas has violated all three sets of constitutional guarantees.

C. Substantive Due Process of Law Forbids Texas From Terminating the Parental Bond Between Petitioner and His Daughter Without Demonstrating a Compelling Need To Do So. The Record in This Case Makes It Clear That Texas Has Failed To Establish Any Basis in Fact for Terminating Petitioner's Relationship With His Daughter, Much Less A Compelling One.

Although disagreement exists over the precise contours of the substantive reach

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1/ Violations of petitioner's equal protection rights are discussed in Point II, infra.

of the Due Process Clause, at a minimum it forbids the government from overriding constitutionally protected interests in the absence of a genuine need to do so. Cf. Roe v. Wade, 410 U.S. 113 (1973). Where, as here, Texas seeks to extinguish a constitutionally protected relationship of the highest order, substantive due process requires it to demonstrate an interest of sufficient magnitude to justify its activity. Where a state demonstrates parental unfitness, abandonment or a danger of harm to a child, the undoubtedly compelling interest in protecting the welfare of children justifies terminating a parental relationship. When, however, the state's investigation reveals a competent parent who is anxious to assume his parental responsibilities, no substantial state interest justifies termination of a parental relationship merely because a judge (or some other official) believes

that a "better" adoptive parent may be found

Although this Court has never precisely held that a factually-based finding of unfitness, abandonment or harm to a child is a precondition to terminating a parental relationship, the Court has noted in dicta on several occasions that the parental relationship may not be severed without adequate cause. Thus, in Santosky v. Kramer, the Court noted:

> Any parens patriae interest in terminating the natural parents rights arises only at the dispositional phase, after the parents have been found unfit, 455 U.S. 767, n.17.

Similarly, in Quilloin v. Walcott, the Court noted:

> ... that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family over the objections of the parents and their children without some showing of unfitness and for the sole reason that to do so was thought to be in the child's best

interest. 434 U.S. at 255.

Again, in Stanley v. Illinois, the Court noted that the state:

> registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if [the parent] is a fit father, the State spites its own articulated goals when it needlessly separates him from his family. Stanley v. Illinois, supra, 405 U.S. at 652-53.

Indeed, in Santosky, Justice Rehnquist, writing in dissent for the Chief Justice and Justices O'Connor and White, stated that the majority (consisting of Justices Brennan, Marshall, Blackmun, Powell and Stevens):

> ...probably would balk at a state scheme that permitted termination of parental rights on a clear and convincing showing merely that such action would be in the best interests of the child. 455 U.S. 773, (Rehnquist, J. dissenting).

Two of the Santosky dissenters (the Chief Justice and Justice Rehnquist) had already

joined in Justice Stewart's concurrence in Smith v. OFFER, supra, which similarly condemned a "best interest" standard to "force the breakup of a natural family" as an impermissible intrusion on "the private realm of family life which the state cannot enter." 431 U.S. 816, 862-63.

Texas itself recognizes that, ordinarily, it must demonstrate such factors as parental unfitness, abandonment or a danger of harm to the child before terminating a parental relationship. Texas Fam. Code §15.02; In Interest of G.M., 596 S.W.2d 864 (Tex. 1980); In Interest of Hare, 599 S.W. 2d 856 (Tex.Civ.App. 1980). In doing so, Texas reflects the settled practice in virtually every other state.[1/] To the extent

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1/ As a recent commentator has correctly noted, "the trend is towards more specific termination statutes which satisfy procedural as well as substantive due process requirements." Note, Termination of Paren-

(footnote continued on following page)

Texas, or any other state, deviates from the "harm" standard to sever a parental bond it falls below the minimum threshold of required state interest imposed by substantive due process.

Given the inherent vagueness of a best interest standard, termination of parental rights in Texas can take place for both permissible reasons, such as the unfitness of the parent, and for impermissible reasons, such as the parent's religious beliefs.[1/] In the present case, there is

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(footnote continued from previous page) tal Rights: The Substantive Due Process Issue, 26 St. Louis U.L.J. 915, 926 (1982). While no state still uses the "best interest" standard in the context of a termination proceeding per se, the applicable state statutes are listed in the appendix to this brief.

1/ Would the decision have been different if Mr. Kirkpatrick had formally joined a church, been married, moved away from his hometown, stopped smoking, or not had epilepsy? There is no way he can know on what basis he lost his daughter or what he could have done differently to forestall that loss.

no way that petitioner, or even an appellate court, can know upon what facts the trial court determined that it would not be in the best interest of Baby Girl S to grant her father's petition for legitimation. Since there is nothing in the record establishing his unfitness, and indeed the record contains a social services report concluding that Mr. Kirkpatrick is fit to assume custody of his daughter (J.A. at 395a), it is possible that the trial court reached its decision based on petitioner's status as a single parent, the fact that he sometimes uses bad language (J.A. at 148a), the fact that he has epilepsy, or even the nature of his religious beliefs. It is also possible that the trial court reached its decision based upon a comparison between the admittedly imperfect Mr. Kirkpatrick, and the "best possible" and hypothetical two parent Christian adoptive family sought by

the child's mother and her parents (J.A. at 148a, 151a, 177a, 323a). Obviously all parents could be found wanting as measured against some hypothetical standard of perfection.

Under Texas Fam. Code §13.21 the trier of fact is left to apply his or her own subjective judgments about what is "best" for a child. The application of such subjective decision-making, in an area that is already as highly subjective as parent-child relationships, places a parent in substantial jeopardy that, as here, he may be deprived of his fundamental right to raise his child absent a showing that such a deprivation is justified by compelling necessity or even a substantial state interest.

Nothing in the record of this case comes close to demonstrating the minimum degree of potential harm to the child which

the constitution requires before a state may sever a parental bond. Cf. Thompson v. Louisville, 362 U.S. 199 (1960). In the absence of such a showing, a state may not end a relationship between a competent and loving parent merely because a judge thinks that someone else might do a "better" job of raising the child.

D. Procedural Due Process of Law Forbids Texas From Terminating the Parental Bond Between Petitioner and His Daughter (1) Pursuant to a Subjective and Conclusory Standard Which Is Unconstitutionally Vague and Overbroad; and (2) In a Proceeding in Which Petitioner Bears the Burden of Proof.

1. The Best Interest Standard Is Unconstitutionally Vague and Overbroad.

As the record in this case and the previous discussion illustrate the best interest standard is both vague and overbroad. A "best interest" standard can mean anything and must necessarily vary from

judge to judge "leaving determinations unusually open to the subjective values of the judge." Santosky, supra, 455 U.S. 762, 71 L.Ed.2d at 612. Termination under a best interest standard may, therefore, take place for perfectly permissible reasons, such as parental unfitness, abandonment or danger of harm, or for impermissible reasons ranging from racial or religious bias to cultural rigidity. See Point I (C), supra. See generally Thornhill v. Alabama, 310 U.S. 88 (1940); NAACP v. Button, 371 U.S. 415 (1963)

Not surprisingly, therefore, the best interest standard provides no objective guidance whatever to the judges and other officials vested with responsibility for enforcing it or to persons against whom it

is applied.[1/] Accordingly, it violates all three of the policies which underlie the void for vagueness doctrine. See generally Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67 (1960).

First, a best interest standard fails to "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).[2/] Were petitioner to have scrutinized the Texas statutes governing this case and the decision of the trial court, he would have been utterly unable to

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1/ It is not necessary to discuss the vagueness and overbreadth issues separately since it is the inherent vagueness of the best interest standard which gives rise to its overbroad application.

2/ The "notice" aspects of the vagueness doctrine flow from Lanzetta v. New Jersey, 306 U.S. 451 (1939).

ascertain what behavior Texas found objectionable. In effect, petitioner has lost his child without ever having been told why.

Second, the best interest standard "impermissibly delegates basic policy matters to...judges and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory applications." Grayned v. City of Rockford, supra; Papachristou v. City of Jacksonville, 405 U.S. 156, 168-69 (1972), Smith v. Goguen, 416 U.S. 566 (1974); Colautti v. Franklin, 439 U.S. 379 (1979).[1/] The wholly conclusory nature of the best interest standard virtually invites arbitrary, unequal and discriminatory application of the law---arbitrary, in that the purely subjective nature of the standard is

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1/ The excessive discretion aspect of the vagueness doctrine is traceable to Connolly, Comm'r. v. General Construction Co., 269 U.S. 385 (1926).

incapable of objective application; unequal, in that the standard of necessity may vary radically from judge to judge; and discriminatory in that it encourages subjective prejudice and stereotypical thinking.

Third, the best interest standard, by vesting judges with a form of codified discretion, impermissibly delegates policy-making authority to the judiciary. Where, as here, a law impinges on a constitutionally protected value, classic separation of powers analysis insists that policy be articulated by a legislative body. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). See generally Neuborne, Judicial Review in France and the United States, 57 N.Y.U.L. Rev. 363, 412-419 (1982).

While reasonable persons may occasionally differ as to the degree of precision required of a statute in a given context, a best interest standard fails to satisfy

even the most permissive standard of legislative specificity. Indeed, this Court has repeatedly noted the insuperable vagueness problem posed by a best interest standard.

In Smith v. OFFER, supra at 835, n. 36, this Court noted that "judges...may find it difficult, in utilizing vague standards like 'the best interest of the child' to avoid decisions resting on subjective values."

In Bellotti v. Baird, 443 U.S. 628, 655-56 (1979), four members of the Court (Justices Brennan, Marshall, Stevens and Blackmun) noted that a best interest

> Standard provides little real guidance to the judge...(whose) decision must necessarily reflect personal and societal values and mores whose enforcement is fundamentally at odds with privacy interests.

In Sandosky v. Kramer, supra at 762, the Court noted that vague termination standards leave judges "unusual discretion to underweigh probative facts that might favor the parent."

The lower courts have also recognized the constitutional invalidity of a best interest standard for termination of parental rights.[1/] E.g. Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10, 17-18 (S.D. Iowa 1975) aff'd on other grounds, 545 F.2d 1137 (8th Cir. 1976); Roe v. Conn, 417 F. Supp. 769,

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1/ The inherent subjectivity of a best interest standard has also been widely noted by scholars and commentators. See e.g., Chemerinsky, Defining the Best Interests: Constitutional Protections in Involuntary Adoptions, 18 J. of Fam. L. 79 at 105 (1979); Note, The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings, 68 Geo. L.J.213 (1979);Day,Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the Parens Patriae Rationale, 16 J. of Fam. L. 213, 218 (1977); see also Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. at 649, 688-700 (1976); Note, The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudication, 44 Brooklyn L. Rev. 63, 87 (1977); Note, Parens Patriae and Statutory Vagueness in the Juvenile Court, 82 Yale L. J. 745, 746-7 (1973).

780 (M.D. Ala. 1976)(3-judge court)("welfare of the child"standard invalid); In Re Five Minor Children, 407 A.2d 198, 199 (Del. 1978); ("best interest" standard invalid);[1/] State v. Robert H., 393 A.2d 1387, 1390 (N.H. 1978) ("best interest"standard invalid); Davis v. Smith, 583 S.W. 2d 37 (Ark. 1979)("Proper home" standard invalid); Linn v. Linn, 286 N.W. 2d 765 (Neb. 1980)("best interests and welfare of children" standard invalid). See

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1/ In Re Five Minor Children, supra, reached this Court under the caption Doe and Roe v. Delaware, prob. jur. noted, 445 U.S. 942 (1980), app. dism. for want of a properly presented federal question, 450 U.S. 382 (1981). The Delaware Supreme Court had declared "best interests" to be unconstitutionally vague, but sustained the termination at issue on the alternative "not fitted" standard contained in Delaware law. Doe and Roe v. Delaware raised the question whether "not fitted" represented a sufficiently definite statutory ground for termination of parental rights. This Court also granted review in the only other recent appellate case upholding "best interests" as a termination standard, Johnson v. J. O. L., cert. granted 449 U.S. 818 (1980), judgment vacated and remanded, 449 U.S. 989 (1980), but that case became moot prior to judgment.

also, Interstate Circuit Inc. v. Dallas, 390 U.S. 676 (1968)("acceptable"; "proper"; "not suitable for young persons"). See generally, Day, Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the Parens Patriae Rationale, 16 J. of Family Law 213 (1977-78); Vornholt, Application of the Vagueness Doctrine to Statutes Terminating Parental Rights, Duke Law J. 1980:336.

Since the use of a best interest standard to determine whether to extinguish a parent-child relationship violates all three policies advanced by the vagueness doctrine, this Court should reiterate the unanimous judicial rejection of the standard by invalidating Section 13.21 of the Texas Family Code as void for vagueness.

2. The Texas Proceedings Violated The Principles Set Forth In Santosky v. Kramer By Placing The Burden Of Proof On The Parent Seeking To Raise His Child.

In Santosky v. Kramer, supra, this Court held that in order to terminate a parent's rights, the state must establish its case by clear and convincing evidence. The basis for that decision was that:

> In parental rights termination proceedings, the private interest affected is commanding, the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight.

71 L.Ed.2d at 609. Texas Fam. Code §13.21 is unconstitutional under this decision for two reasons: First, it is the father and not the state or the party seeking to defeat his petition for legitimation that has the burden of convincing the court that the legitimation is in the child's best interest. Second, the concerns expressed in that case, for precise and careful fact-finding in this critically important area, are completely undermined if the substantive standard by which facts are measured, and relevant

evidence weighed, are vague and undefined. Indeed, standards this vague do not even make clear what is "relevant" at all. A statute such as Texas Fam. Code §13.21 thus renders Santosky essentially meaningless: the standard of proof the trial court must apply will not affect its decision as long as it is entirely up to the court's own, ad hoc whim to decide what must be proved. See generally, Smith v. Goguen, 415 U.S. 566, 574 (1974).[1/]

1/ As the Court explained in Goguen:

> Statutory language of such standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislators may not so abdicate their responsibilities for setting the standards of the criminal law. E.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 165-169 (1972). In Gregory v. City of Chicago, 394 U.S. 111, 120, Mr. Justice Black, in a concurring opinion, voiced a concern, which we share, against entrusting law-making "to the moment-to-moment judgment of the policeman on his beat."
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> Id. at 575.

In applying a vague and subjective standard to a competent and concerned parent who seeks to raise his own daughter, Texas has severed the fundamental and highly protected relationship between parent and child without any threshold showing of necessity and in violation of petitioner's procedural and substantive due process rights.

II.

THE IMPOSITION OF DIFFERENTIAL STANDARDS IN TERMINATION PROCEEDINGS BASED UPON SEX OR ILLEGITIMACY VIOLATES THE EQUAL PROTECTION CLAUSE.

Petitioner has demonstrated that the substantive standard governing the attempt by Texas to extinguish his parent-child relationship with his daughter is both unconstitutionally permissive and unconstitutionally vague. See supra at Point I. Moreover, whatever substantive standard a state adopts to govern the termination of a parental relationship, the Equal Protection Clause requires that it be uniformly applied across the spectrum of parent-child relationships in the absence of a compelling justification for differential treatment. Caban v. Mohammed, supra; Stanley v. Illinois, supra.

In this case, Texas has quite properly adopted a rigorous standard of unfitness,

neglect or abandonment proved by clear and convincing evidence as the generally applicable test in parental termination proceedings. Texas Fam. Code §15.02(1). When, however, the father of an out-of-wedlock child seeks to accept responsibility for the rearing of his child over the objection of the mother, Texas requires the father to persuade a judge that it would be in the child's "best interest" to be raised by him as opposed to an unknown set of adoptive parents.[1/]

If such a biological father persuades the judge, he is recognized as a "legal" parent and is entitled to the full protection of Texas law. If the judge is unpersuaded,

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1/ This case does not involve a controversy between the two biological parents for custody of an out-of-wedlock child. Accordingly, it is unnecessary to consider whether a best interest standard is appropriate in such a setting. The controversy herein is between a biological father who has vigorously sought to accept responsibility for his child and an unknown set of adoptive parents.

the biological father's parental rights are denied legal recognition and his child can be placed for adoption. Thus, while most parents in Texas are measured by the "unfitness" standard, the fathers of out-of-wedlock children are subject to a far more permissive "best interest" test. Texas, therefore, differentiates on the basis of sex and illegitimacy in the choice of a governing standard in parent-child termination settings. In the absence of a compelling justification for such differentiation, the Texas practice violates the Equal Protection Clause.

A. Section 13.21 Unconstitutionally Discriminates on the Basis of Sex

It is clear that the Texas statute gives far less protection to the fathers of out-of-wedlock children than to the mothers of such children with regard to their fundamental

right to raise their children.[1/]

Just last term, this Court reaffirmed that gender-based statutory distinctions must meet:

> the burden of showing an exceedingly persuasive justification for the classification....

Mississippi University for Women v. Hogan, U.S. 73 L.Ed.2d 1090 (1982), quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981). A statute that explicitly allocates benefits and burdens on the basis of sex, as does Texas Fam. Code §13.21,:

> must serve important governmental objectives and must be substantially related to the achievement of those objectives in order to withstand judicial scrutiny under the Equal Protection Clause.

Caban v. Mohammed, 441 U.S. 380, 388 (1979),

1/ Mothers of out-of-wedlock children quite properly are subject to the same "unfitness" standards which govern parents of in-wedlock children. Texas Fam. Code §15.02.

citing Craig v. Boren, 429 U.S. 190, 197 (1976).[1/]

The only question in this case, then, is whether the challenged Texas statute meets the test. An examination of the governmental objectives that have been or could be put forth[2/] in support of the statute

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1/ Thus, whether the level of scrutiny is characterized as one of compelling necessity because of the fundamental nature of the interests at stake, see Point I, or whether the gender-based distinction must meet the substantial relationship test, it is clear that the result in the present case is the same.

2/ This Court has:

> refus[ed] to supply a challenged rule with a rationale drawn from judicial imagination or even from the rule's history, where the rationale is not advanced in the litigation in the rule's defense.

Tribe, Constitutional Law §16.03 at 1083-1084. See generally Gunther, "The Supreme Court, 1971 Term - Foreword" In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection, 86 Harv. L.Rev. 1(1973). See also Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1972).

shows that Texas has sought to satisfy whatever legitimate concerns it may properly advance in far too expansive a manner and in a way that impermissibly and unnecessarily penalizes the very fathers and children whose relationships the state has an interest in protecting.

The interests advanced by Texas in support of its differing treatment of the fathers and mothers of out-of-wedlock children have been set out specifically in In Interest of T.E.T., 603 S.W.2d 793 (Texas 1980), cert. den. sub. nom. Oldag v. Catholic Charities, 450 U.S. 1025 (1980) decided subsequent to this Court's decision in Caban.[1/] Characterizing the dis-

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1/ The Texas Supreme Court upheld Texas Fam. Code §13.21 subsequent to Caban, in a decision upon which the present case is based, In Interest of T.E.T., supra. That court attempted to distinguish Caban on the ground that the Texas statute, unlike the one at issue in Caban, provides a mechanism (footnote continued on next page)

tinction between men and women imposed by the statute as "slight," Id. at 797, the Texas Supreme Court listed two objectives in justification: 1) the state's interest in distinguishing between "the father who has accepted the legal and moral commitment to the family and the father who has not done so," Id. at 797, and 2) the state's interest

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by which the father of an out-of-wedlock child can achieve full parental rights, notwithstanding the mother's veto, when the father can prove that legitimation is in the child's best interest. The Texas court found this to be an "appropriately limited [distinction] between the rights of the mother and the rights of the father." In Interest of T.E.T. at 796. While it is true that under Texas law a father who has been successful in a legitimation proceeding has the same rights as the mother, and greater rights than did the father in Caban, it is also true -- and more relevant -- that the Texas father's petition for legitimation, like the pre-Caban New York father's attempt to veto his child's adoption, can be defeated based on a vague "best interest" standard that is not applied to the child's mother.

in "encouraging the unwed mother to properly care for the child by assuring her that her wishes as to the disposition of the child will not, absent her consent or a finding of the child's best interest, be subject to the absolute veto of the biological father," Id. at 797.

With regard to the first justification it is clear that the statute both sweeps too broadly and, at the same time, does not even accomplish the stated goal. A responsible father like petitioner, who sought to marry the child's mother but was refused (J.A. at 190a, 204a, 284a, 314a); who sought to contribute to the costs of the mother's pregnancy but was refused (J.A. at 224a-225a); who has done what he could to support the child by making support payments to the court (J.A. at 105a-106a); and who seeks to

provide a concededly satisfactory home and family to the child (J.A. at 379a, 395a) can be deprived of his right to raise his child pursuant to the subjective standard articulated by §13.21. Conversely, a father who refuses to support his child and has been the subject of an involuntary legitimation proceeding initiated by the mother can be deprived of his parental rights only on a traditional showing of parental unfitness under §15.02.

Thus, the Texas practice has the absurd result of treating defaulting fathers of out-of-wedlock children more favorably than fathers, like petitioner, who have done all they can to accept "the legal and moral commitment to the family." Such an irrational discrimination cannot survive any level of judicial scrutiny. Cf. O'Brien v.

Skinner, 414 U.S. 524 (1974).

More importantly, the state has far more effective ways to accomplish its goals of separating the responsible from the irresponsible father; the "sperm donor, . . . rapist, . . . 'hit and run' lover, . . . adulterer and the like," In Interest of T.E.T., supra, at 797, from "the father who has accepted the legal and moral commitment to the family . . . " Id. at 797. Any father who initiates a petition for legitimation is, by definition, seeking to establish rather than escape his legal and moral commitment. If the father is unfit or has abandoned the child, a petition can be brought to terminate his parental rights under Texas Fam. Code §15.02; there is nothing in Texas law which bars a termination petition from being heard at the same

time as a legitimation petition.[1] In short, the use of a best interest standard, as opposed to the traditional unfitness-abandonment test, is simply not necessary to further the state's interest in differentiating between fathers who should be permitted to raise their children and fathers who should not.

With regard to the state's second stated justification, it hardly encourages a mother "to properly care for the child,"

1/ §15.02(1)(H), for example, authorizes the termination of parental rights of a parent who

> voluntarily, and with knowledge of the pregnancy, abandoned the mother beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child or failed to support the child since the birth . . .

In Interest of T.E.T., supra at 797, to protect her right to give her child away for adoption by strangers when the child's own father eagerly seeks to raise the child himself. It is, of course, true that only women can bear children. Therefore, only women can decide whether or not to continue a pregnancy, and their privacy interest in full control over that decision is a fundamental one. See Planned Parenthood v. Danforth, 428 U.S. 52 (1976). Once the child is born, however, other interests must be weighed in the balance. Where, as here, a mother does not assert an interest in raising her child, the state has no interest in utilizing a vague and discriminatory standard to prevent a caring father from assuming parental responsibility for his child. The state has not, and cannot, assert any le-

gitimate interest in having any child raised by strangers, even in a "two-parent Christian home" (J.A. at 151a, 177a), when the child's father is fit and anxious to provide a home for his child. Indeed, if that were the state's interest, it would be more efficiently served by depriving all parents, mothers and fathers alike, of custody of their out-of-wedlock children. Such an attempt would clearly be unconstitutional; Texas Fam. Code §13.21 is no less unconstitutional because it limits its terms to fathers.

Although not precisely articulated by the Texas Court in T.E.T., supra, the principal interest of the state in the context of an out-of-wedlock birth is assuring the child a stable and loving home. Where neither parent is prepared to accept responsibility for the nurturing of the child, the

state may, of course, extinguish parental rights under an unfitness or abandonment standard in order to make the child legally available for a stable adoptive home. When, however, the father of an out-of-wedlock child is willing and able to provide a stable and loving home, no state interest whatsoever is advanced[1/] by applying a dif-

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1/ In this case, petitioner asserted his willingness to accept responsibility for his child from the moment he learned of the pregnancy. Where the father of an out-of-wedlock child fails to come forward to accept responsibility for the child's care and nurture, no constitutional bar exists to a procedure which would free the child for adoption in a stable home. The precise requirements as to timing and notification are, of course, a matter for legislative consideration so long as they meet the requirements of the Due Process Clause. However, nothing in petitioner's argument would require out-of-wedlock children to remain in limbo while their parents decide whether to accept responsibility for them. It is only when, as here, the state uses a vague and subjective best interest standard to deprive a competent parent eager to assume his family responsibilities of his right to do so, and/or when it applies that standard only to men that a constitutional issue is posed.

ferential standard that facilitates the child's adoption by strangers.[1/]

Indeed, this Court has already determined that no state interest justifies a gender-based discrimination between the mother and father of an out-of-wedlock child. Caban v. Mohammed, supra. See also, Stanley v. Illinois, supra.[2/] In Caban, a New

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1/ Texas' practice in this regard is not widely shared. Only eight states would apply the "best interest" standard to the fathers of an out-of-wedlock child in the circumstances presented here while applying a more rigorous standard to the child's mother. Two more states deny the fathers of out-of-wedlock children any role in their children's adoption. The states' practices in this regard are set out in detail in the statutory appendix to this brief.

2/ Illinois had attempted to rationalize its double standard, by defining parents so as to exclude unwed fathers. The court quickly disposed of this attempted sleight of hand as an effort to "avoid the issue." Stanley v. Illinois, supra, at 652.

York statute permitted the mother, but not the father, of an out-of-wedlock child to veto the child's adoption. Noting that the children's father had developed a substantial personal relationship with his children, this Court held that

> the effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child.

Caban, supra at 394. The Court examined two possible justifications for the statute: the assumption that mothers have a closer relationship to their children than fathers; and the state's interest in promoting the adoption of illegitimate children that would

be disserved by providing the fathers with veto power. In rejecting both of these justifications the Court made clear that its holding applied to "loving fathers" who "have manifested a significant paternal interest in the child," Id. at 394, and not to "the father [who] never has come forward to participate in the rearing of his child . . . " Id. at 392. The majority opinion explained the limitation of its ruling: its decision did not necessarily apply to a situation in which unwed mothers might be closer than unwed fathers to their newborn infants, nor to a situation involving "the special difficulties attendant upon locating and identifying unwed fathers at birth . . ." Caban, supra, at 389, 392. However, in the present case the mother has relinquished her child for adoption; it is only the father

who seeks a relationship with his daughter. Nor does this case involve any difficulty in locating the unwed father of an infant. By its terms the statute that petitioner challenges applies only to fathers who have come forward and identified themselves.

As the dissent in Caban points out, there is a legitimate state interest in facilitating the adoption of infants whose mothers have relinquished them and whose fathers have not come forward, Caban, supra, at 399, or whose identity may be unknown. Caban, supra, at 399. However, even the reasoning applied by the dissent provides support for extending the rule in the Caban case to a father such as Mr. Kirkpatrick. In the present case, there is no countervailing state interest in adoption; the child's father wishes to raise her. There

is no question of paternity; the mother has acknowledged it and Mr. Kirkpatrick has sought legal recognition of his relationship to his daughter. He has attempted to avoid the imposition of any stigma of illegitimacy on his child by asking her mother to marry him;[1/] he attempted to provide support for the child's mother during her pregnancy; he has expressed love, concern and interest in the child both before and, more particularly, after his child's birth. He has done everything within his power to have

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1/ One of the justifications cited by three of the dissenters in Caban in support of limiting the rights of fathers of out-of-wedlock children was that the state could thereby serve its interest in discouraging illegitimate births.

> [Such a rule] gives the loving father an incentive to marry the mother . . .

Caban v. Mohammed, supra, at 407, (Stevens, J., dissenting) The fallacy in the assumption that responsible fathers need that incentive while mothers do not is apparent from the present case.

a parental relationship with his daughter and to be a true father to her.

Texas Fam. Code §13.21 treats such concerned fathers, who seek to establish rather than deny paternity and to raise their children, in a manner substantially different from mothers,[1/] even those who seek to give their children away to strangers. Accordingly, this Court's ruling in Caban v. Mohammed governs the present case, since fathers of very young children, who have acted as Mr. Kirkpatrick has, can be the kind of loving and concerned fathers whose rights are entitled to the same protections as those afforded mothers. As in Caban, the sexual stereotyping which underlies the Tex-

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1/ Sex-based distinctions with regard to parental rights are nothing new in Texas. See e.g. Armstrong v. Manzo, supra.

as statute:

> excludes some loving fathers from full participation in the decisions whether the children will be adopted and at the same time enables some alienated mothers arbitrarily to cut off the paternal rights of fathers.

Caban, supra, at 394.

The harm done to the "loving father" who has "manifested a significant paternal interest in the child," Caban, supra at 394, is patent. Less obvious but equally invidious is the harm done to women generally by perpetuation of such stereotypes. As a result, women are invariably locked into the child-caring role and unable to share child-caring responsibilities equally with men. Great harm, both psychological and social, is done to women and men who do not fit the stereotyped mold. Women are unfairly condemned by

society when they lose or relinquish custody of their children, and men disparaged when they assume primary caretaking and nurturing roles. Such stereotypes disserve both children and their parents[1/] and have been repeatedly condemned by this Court. Stanley v. Illinois, supra; Orr v. Orr, 440 U.S. 268 (1979); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Weisenfeld, 420 U.S. 636 (1975).

1/ It is increasingly the case that single fathers are assuming responsibility for their children. The number of single parent households with children under 18 that are headed by men has almost doubled in the last decade. U.S. Census Bureau, Current Population Reports, Series P-20, Number 371 Household and Family Characteristics, (March 1981). The number of children being raised by single fathers who have never been married increased by almost 400% from 1970 to 1981 to 112,000. U.S. Census Bureau, Current Population Reports, Series P-20, Number 372, Marital Status and Living Arrangements (March, 1982).

Moreover, studies show that single fathers do quite well as parents:

> [T]he degree of stability

(footnote continued on following page)

B. Section 13.21 Unconstitutionally Discriminates on the Basis of Illegitimacy.

Baby Girl S is a child who was born out-of-wedlock. One of her parents has relinquished her for adoption, but the other wishes to provide a home for her. Solely because she is illegitimate, this

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(footnote continued from previous page)
we encountered in these fathers-only homes as well as the caliber of the parent-child relationships, struck us as being unusually high. I. Victor and W. Winkle, Fathers and Custody, 162, (1977). See also P. Chang and A. Deinard, Single-Father Caretakers: Demographic Characteristics and Adjustment Processes, 52 American Journal of Orthopsychiatry, 236 (1982); D. Orthner and K. Lewis, Evidence of Single Father Competence in Child Rearing, 13 Family Law Quarterly 27 (1979); K. Lewis, Single Father Families: Who They Are And How They Fare, 52 Child Welfare 643 (1978); D. Ortiner, T. Brown and D. Ferguson, Single Parent Fatherhood: An Emerging Family Life Style, 25 The Family Coordinator 429 (1976); H. Mendes, Single Fathers, 25 The Family Coordinator 439 (1976).

child is being deprived of her fundamental right to a relationship with a caring natural parent, by virtue of the operation of Texas Fam. Code §13.21.

It is clear that the right to a family relationship is a reciprocal one, of equal significance to parent and child.[1/] Moreover, the state has no legitimate interest in interfering in that relationship, absent a showing of compelling necessity. See Point I supra.

Nevertheless, in Texas legitimate children have a right to a relationship with their biological fathers absent a showing that the father is unfit or has

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1/ "[U]ntil the State proves unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. [fn. omitted]" Santosky v. Kramer, supra, 71 L.Ed.2d at 611.

abandoned them, but illegitimate children can be deprived of that right even where, as here, their mother has surrendered them for adoption.

The standard of scrutiny applied to statutory provisions that provide classifications based on illegitimacy requires that the classification bear a substantial relationship to a permissible state interest. Lalli v. Lalli, 439 U.S. 259 (1978). However, the "scrutiny 'is not a toothless one,'" Trimble v. Gordon, 430 U.S. 762, 767 (1977). This Court has recognized that

> the Equal Protection Clause requires more than the mere incantation of a proper state purpose.

Id. at 769.

The most frequent justification put forth in support of differing treatment for legitimate and illegitimate children has

been the difficulty in establishing paternity.[1/] The Court has given due deference to this concern, insofar as it has had validity in a particular instance, but otherwise has invalidated distinctions between legitimate and illegitimate children as unconstitutional.

Illegitimate children in Texas have had a particularly difficult time of it. Prior to 1973, they did not share the right of legitimate children to support from

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1/ This Court has recognized that the importance of "the creation of a parent-child relationship: between unwed father and child is so important, and that the parent and child's interest in the accuracy of the determination is sufficiently (compelling) that due process requires the state to pay the costs of blood tests relating to the establishment of paternity." Little v. Streater, 452 U.S. 1 (1981).

their fathers, Gomez v. Perez, 409 U.S. 535 (1973).[1/]

In response to Gomez, Texas enacted a statute to establish a father's support obligation, but imposed a one year statute of limitations on the filing of the proceeding. Noting the state's history of differing treatment of illegitimate children with regard to support, the Court struck down the one year limitations period, ruling that benefits must be made available in such a way as to "be more than illusory." Mills v. Habluetzel, 71 L.Ed.2d 770, 776 (1982).

Texas has made the right to a family relationship between a father and his out-

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1/ In holding such a distinction to violate the equal protection clause of the Fourteenth Amendment, this Court noted

> Those problems [concerning proof of paternity] are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination.

Id. at 538.

of-wedlock child available in a similarly illusory way. Illegitimate children have a right to such a relationship but, unlike legitimate children, they can be deprived of that right, should the mother withhold her consent to legitimation, by the application of a vague and conclusory best interest standard. On the other hand, legitimate children can only be deprived of a relationship with their fathers after a specific finding of unfitness, neglect, non-support, or abandonment pursuant to Texas Fam. Code §15.02.

In evaluating statutory schemes according legitimate and illegitimate children different treatment this Court has made clear that some differing treatment may be allowed to the degree that it is substantially related to a valid state interest, Mills v. Habluetzel, supra at 777, (shorter limitations period in support suit

concerning illegitimate children permissible since proof problems are different and state has an interest in avoiding the litigation of state of fradulent claims). However, as discussed above, there are no valid state interests to which the challenged Texas statute is substantially related. While the state may have an interest in ending a child's status as illegitimate,[1/] Texas Fam. Code §13.21 affects only children whose fathers voluntarily seek to establish responsibility for them but does not apply to mothers who seek to retain custody of their out-of-wedlock offspring. If the state sought to accomplish its purpose through a statute that denied legiti-

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1/ The statute's application in this case is particularly unjust since the father sought to avoid having his child born out-of-wedlock, but the child's mother refused to marry him. (J.A. at 190a, 204a, 284a, 314a)

mation to both the mothers and fathers of illegitimate children, such a statute would clearly have a "reach far in excess of its justifiable purpose . . . " Lalli v. Lalli, supra, at 272. As the Court has said:

> [W]hen state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny [citations omitted]. The essential inquiry in all the foregoing cases is . . . inevitably a dual one: What legitimate state interest does the classification promote? What fundamental rights might the classification endanger?

Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972).

Texas Fam. Code §13.21 might arguably promote the state's interest in ending a child's illegitimate status by making the child more readily available for adoption.[1/]

1/ The Texas statute does not, however, make it more likely that a child will be raised in a caring, nurturing home when, as now, the child's father and his family
(footnote continued on following page)

However, where, as here, a biological father is anxious to provide a loving home, the state has no interest in encouraging adoption.[1/] See Caban v. Mohammed, supra, at 391-392.

In this particular case, of course, petitioner seeks to do more than establish parentage. He seeks legal recognition of his relationship with his daughter, not simply to block her adoption by strangers but so he can assume custody of her and raise her himself. Solely because his

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(footnote continued from previous page) are eager to assume responsibility for her. The statute does not even make it more likely that the child will be raised in a two-parent family since mothers of out-of-wedlock children may remain single while fathers may marry.

1/ Since Texas Fam. Code §13.21 only affects the fathers of those children who voluntarily seek a relationship with their child, the state cannot argue that its vague best interest standard in any way serves the state's interest in certainty with regard to the parentage of children.

daughter is illegitimate, petitioner has been treated differently from all other parents and his child has been deprived of the opportunity to be raised by a fit and loving natural parent. The harshness of this result, which deprives illegitimate children of a fundamental right available to all other children, renders Texas Fam. Code §13.21 unconstitutional.

Conclusion

For all the foregoing reasons, petitioner respectfully requests that this Court reverse the judgment of the court below and rule that Texas Fam. Code §13.21 violates petitioner's constitutional rights.

Respectfully submitted,

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Statutory Appendix

I. State Law Substantive Standards For Termination of Parental Rights

A. The termination of parental rights standard in every state presently guarantees parents some form of unfitness, abandonment, "continuous neglect," or other "harm to the child" substantive standard, father than a "best interest" standard in proceedings brought to terminate parental rights.

See: Ala. Code tit. 26 §10-3(1982); Alaska Stat. §47.10.080(c)(3)(1982); Ariz. Rev. Stat. Ann. §8-533(1981); Ark. Stat. Ann. §56-128(1981); Cal. Civ. Code §232 (1982); Colo. Rev. Stat. §19-11-105 (1978); Conn. Gen. Stat. §45-61(f)(1981); Del. Code Ann. tit. 13 §1103 (1981); Fla. Stat. Ann. §39.41(1)(f)(1)(1981); Ga. Code Ann. §74-405(1981); Haw. Rev. Stat. §571-61 (1976); Idaho Code §16-2005 (1979); Ill. Ann Stat. Ch. 37 §705-9 (1981); Ind. Code Ann. §31-6-

5-4 (1982); Iowa Code Ann. §§232.116,600 A.8 (1980);

Kan. Stat. Ann §59-2102 (1976); Ky. Rev. Stat §199.603 (1978); La. Rev. Stat. Ann. §13.1601 (1981); Me. Rev. Stat. Ann. tit. 22 §4055 (1982); Md. Ann Code art. 16 §74 (1982); Mass. Gen. Laws Ann. ch. 210 §3 (1977); Minn. Stat. Ann. § 260.221 (1982); Miss. Code. Ann. §93-17-7 (1982); Mich. Comp. Laws Ann. §712A.19A (1981); Mo. Ann. Stat. §211.447 (1982); Mont. Rev. Codes Ann. §41-3-609 (1981); Neb. Rev. Stat. §43-292 (1979); Nev. Rev. Stat. §128.105 (1973);

N.H. Rev. Stat. Ann. §170-c:5(1981); N.J. Stat. Ann. §9:2-19 (1980); N.M. Stat. Ann.§40-7-4 (1982); N.Y. Jud. Law §614(1)(e), Soc. Serv. Law §384-6, Dom. Rel. Law §111 (1979); N.C. Gen. Stat. §7A (1981); N. D. Cent. Code §§27-20-44, 14-15-06 (1974);

Ohio Rev. Code Ann. §2151.353 (1972); Okla. Stat. Ann. tit. 10 §1130 (1982); Or. Rev. Stat. §419.523 (1981); Pa. Stat. Ann. tit. 23 §2511 (1981); R.I. Gen. Laws §15-7-7 (1981); S.C. Code §20-7-1590 (1982); S.D. Codified Laws Ann. §26-8-36 (1977); Tenn. Code Ann. §37-246 (1979); Tex. Fam. Code Ann. §15.02 (1982); In re J.P., 648 P.2d 1364 (Utah 1982); Vt. Stat. Ann. tit. 33 §656 (1981); Va. Code §§16.1-283, 63.1-225 (1980); Wash. Rev. Code Ann. §13.34.190 (1981); W.Va. Code §49-6-5(6)(1980); Wis. Stat. Ann. §48.40 (1979); Wyo. Stat. §14-2-309 (1981).

B. Notwithstanding the above, several states and the District of Columbia have local statutes permitting the application of a lesser substantive standards where the question arises in the context of a parent's[1/] refusal to consent to the child's adoption. In such cases local statutes permit the court to dispense with either parent's consent upon a finding that consent is being withheld contrary to the "best interests of the child."

See: Ariz. Rev. Stat. Ann. §8-106 (1981); D.C. Code §16-304(e)(1982); Iowa Code Ann. §600.7(1981); Mass. Ann. Laws ch 210 §3 (1981); N.D. Cent. Code §14-15-19 (3)(c)(1981); Va. Code Ann. §63.1-225(c)(1980).

1/ The statutes listed here apply to either parent, regardless of sex. States where a lesser standard is applied to fathers only are listed infra at Point II.

C. However, in half of these jurisdictions, state courts have effectively eviscerated the "best interest" exception for reasons parallelling those argued by petitioner here. In three of these states, therefore, the effective rule is that a showing of unfitness or harm is always necessary where permanent termination of parental rights is at stake.

See: In Re Hyatt's Adoption, 27 Ariz. App. 170, 536 P.2d 1062 (Ariz. 1975); Custody of a Minor, 421 N.E.2d 63 (Mass. 1981); Kottsick v. Carlson, 241 N.W.2d 842 (N.D. 1976); see also Board of Supervisors v. Medical Structures, Inc., 192 S.E.2d 799 (Va. 1972); ("detrimental to the welfare of the child" standard).

II. Differential Standards Applying to Out-of-Wedlock Fathers.

A. In dispensing with parental consent to an adoption, only ten states treat the unwed father who has established his biological paternity[1] differently from other parents.

1. Although the precise procedural context varies (i.e. overt overriding of his refusal to consent, as opposed to refusal of permission to achieve "parental" status through legitimation), seven states, including Texas, permit the adoption of an out-of-wedlock child to proceed without the consent of an available and involved natural father simply upon a finding that adoption is in the child's "best interest."

See: Ala. Code §§26-10-3, 26-11-3 (1982); Ark. Stat. Ann §56-106, 34-718 (1981); Ga. Code Ann. §24A-3202 (1982); Me. Rev. Stat. Ann. §532-C (1982); Mont. Rev.

1/ State procedures vary considerably as to the manner and time in which the father of an out-of-wedlock child may establish biological paternity and/or legitimate his child. As this case presents no question concerning the constitutional validity of these procedures, this (cont'd)

Codes Ann. §§40-6-130 (1981); Neb. Rev. Stat. §43-104.06 (1978); Tex. Family Code Ann. §13.21 (1981).

2. Two states dispense with the unwed father's consent entirely, as a matter of state statute:

Miss. Code Ann. §93-17-3 (1973); Okla. Stat. Ann. tit. 10 §§55, 60.5(2)(1982).

3. New York dispenses with the unwed father's consent when the child is placed for adoption at age six months or less and the father has not openly lived with the child or the child's mother for the six months preceding placement of the child for adoption.

NY Dom. Rel. Law §111 (1982).

B. Conversely, forty-one jurisdictions apply the same standard to unwed fathers as they do to other parents, where the unwed father has demonstrated the degree of interest and support petitioner Kirkpatrick has in this case.

(cont'd)
statutory appendix draws no distinctions as among such statutes.

See: Alaska Stat. §§25.23.050, 25.23.040(2) (1982); *Ariz. Rev. Stat. Ann. §8-106 (1981); Cal. Civil Code §§224, 7004(a)(4)(1982); Colo. Rev. Stat. Ann. §§19-1-103, 19-4-107, 19-6-105 (1980); Conn. Gen. Stat. Rev. §45-61(i)(1981); Del. Code Ann. tit. 13 §908 (1974); *D.C. Code §16-304, 16-909 (1982); Fla. Stat. Ann. §63.062 (1981); Hawaii Rev. Laws §578-2 (1977); Idaho Code §§16-1504, 1510 (1979); Ill. Ann. Stat. Ch. 40 §§1501(E), 1510(a) (1980), 31-6-631-9; Ind. Ann Stat. §§31-3-1-6 (1980); *Iowa Code Ann. §§600A.2, 600A.8, 600.7 (1981); Kan. Stat. Ann. §38-113(a)(1976); Ky. Rev. Stat. Ann. §199.500(1982); La. Rev. Stat. Ann. §§9:404, 9:422.3 (1965), LSAACC §203 (1981); Md. Ann. Code Art. 16 §§68, 72 (1981); *Mass. Ann. Laws c. 210 §2,

3, 4A (1981); Mich. Comp. Laws Ann. §710.31 (1981); Minn. Stat. Ann. §§259.21 (3), 259.24, 259.26 (1982); Mo. Rev. Stat. §453.015, 453.030 (1982); Nev. Rev. Stat. §§126.031, 126.051, 127.090 (1982); NH Rev. Stat. Ann. §170-B:5, 6 (1982); NJ Stat. Ann. §§9:3-8, 9:3-38 (1982); NM Stat. Ann. §40-7-6 (1978); NC Gen. Stat. §48-6 (1981); *ND Cent. Codes §§14-15-05, 14-15-20 (1981); Ohio Rev. Code Ann. §3107.06 (1981); Ore. Rev. Stat. §§109.092, 109.125 (1981); Pa. Stat. Ann. tit. 23 §2711, 8302 (1981); RI Gen. Laws Ann. §§15-7-5, 15-7-7, 15-7-26 (1972); SC Code Ann. §20-7-1710 (1982); SD Compiled Laws Ann. §§25-6-1, 25-6-4 (1976); Tenn. Code Ann. §§36-111, 302 (1982); Utah Code Ann. §78-30-4 (1980); Vt. Stat. Ann. tit. 15 §435; *Va. Code Ann. §63.1-225 (1980);

Wash. Rev. Code Ann §§26.26.020, 26.32.030, 26.26.040 (1981); W. Va. Code §48-4-1 (1980); Wisc. Stat. Ann. §§48.025, 48.91 (1981); Wyo. Stat. Ann. §§1-22-109, 110 (1977).

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*Although statutes with asterisks contain an unconsitutionally vague "best interest of the child" standard to dispense with parental consent in an adoption proceeding, they apply it uniformly to men and women regardless of marital status. In several instances, they have been narrowed substantially by judicial interpretation. See I, part B, supra.

No. 82-647

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Donald J. Kirkpatrick,

Petitioner,

v.

Christian Homes of Abilene, Inc., and the 326th District Court of Taylor County, Texas,

Respondents.

ON WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

PETITIONER'S RESPONSE TO THE QUESTION POSED BY THIS COURT

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PETITIONER'S RESPONSE TO THE QUESTION POSED BY THIS COURT

The Court has asked petitioner to respond to the question whether, in light of the representations in the brief filed by the State of Texas, the Writ of Certiorari should be dismissed, or this case remanded to the Supreme Court of Texas.

Petitioner opposes the dismissal of the writ and/or the remand of this case to the Supreme Court of Texas to determine whether petitioner is entitled to relief under the paternity section of the Texas Family Code. Although petitioner would support the Attorney General's reading of Texas law in the Supreme Court of Texas, petitioner believes it extremely unlikely that the Attorney General's reading would be accepted by that court, and that a remand would create an unnecessary and potentially damaging delay in the permanent placement of the child who is the subject of these proceedings.

I. EXISTING PRACTICE UNDER THE TEXAS STATUTORY SCHEME

The two sections of the Texas Family Code at issue herein govern the establishment of paternity and legitimation, respectively. Cases falling under the paternity section, Subchapter A of Texas Family Code §13, raised for the first time in these proceedings by the Texas Attorney General, involve disputes over the identity of the father of a given child. Cases falling under the legitimation section, Subchapter B of Texas Family Code §13, which both the parties, their experienced counsel, and the courts below concluded

governed this case exclusively, involve attempts by persons whose biological parentage is conceded to assert legal rights in connection with a given child.

Since no question exists as to petitioner's biological status as father, he followed universally accepted Texas practice in seeking to establish his legal rights pursuant to Texas' legitimation statute.

II. THE SUGGESTION OF THE ATTORNEY GENERAL OF TEXAS

The Attorney General of Texas has advanced a novel reading of the Texas Family Code in this Court. Instead of reading the paternity section as establishing and governing proceedings contesting biological parentage, he argues that it is applicable to purely legal issues as well,in cases in which parentage is conceded. If the Attorney General's construction of the Texas Family Code is correct, petitioner, by electing to move under the paternity statute would, in fact, be entitled to the procedural and substantive guarantees which he seeks in this Court. A right as fundamental as parenthood would, under the Attorney General's theory, turn on a technical question of pleading under Texas law.

Unfortunately, however, the Attorney General's construction, which renders the legitimation statute utterly superfluous, is not likely to be adopted by the Supreme Court of Texas. The Texas courts have repeatedly distinguished between Subchapter A, referring to it as the "involuntary legitimation" provision, see, e.g., Wynn v. Wynn, 587 S.W.2d 790 (Tex. Civ. App. 1979), and Subchapter B, the voluntary legitimation provision, Shockome v. Hernandez, 587 S.W.2d 535 (Tex. Civ. App. 1979).

Indeed, Subchapter A provides that paternity be proven through the use of blood tests, Tex. Fam. Code §13.06, while Subchapter B provides that biological parenthood be established through the father's sworn statement of paternity, §13.22. See Shockome v. Hernandez, supra. Furthermore, the Supreme Court of Texas has referred to Section §13.21 as the means by which "the biological father of an illegitimate child . . . establish[es] his status as a parent. . . . " In Interest of T.E.T., 603 S.W.2d 793, 794 (Tex. 1980), cert. den. sub. nom. Oldaq v. Catholic Charities, 450 U.S. 1025 (1980).

III. DIFFICULTIES INHERENT IN THE ATTORNEY GENERAL'S POSITION

Although the Attorney General's reading is not literally foreclosed -- fathers may clearly commence a paternity action under Texas law -- it appears to run headlong into the traditional canon of statutory construction which requires that all parts of a statute be given effect. If the legitimation section of the Texas Family Code may be avoided by the simple expedient of labelling the action as a paternity suit, the legitimation statute will cease to have meaning.

The Attorney General recognizes that an apparently irreconcilable relationship between the paternity and legitimation statutes would be created by his construction, A.G. Br. at 8-9. He argues,however, that since the paternity section was nacted in 1975, and the legitimation section in 1973, the subsequently-enacted paternity section should be read to "negate," A.G. Br. at 9, the prior legitimation statute Unfortunately for this argument, the fact is that both the paternity and legitimation statutes were amended and re-enacted as recently as

1981, thus rendering them of equal status even by the Attorney General's own reasoning. In any event, even if a two-year difference in the age of the statutes existed, the statutes can be reconciled by construing the paternity statute to apply only to cases involving contested issues of biological parentage, which is precisely the reading both counsel below and the Texas Court have effectively given it. This construction, of course, is more likely to be accepted than the Attorney General's reading, which renders the legitimation statute meaningless.

IV. PETITIONER'S REASON FOR OPPOSING REMAND

While petitioner would, of course, support the construction of the Texas Attorney General below, it is doubtful, given the established Texas practice and the approach of the Supreme Court of Texas in In Interest of T.E.T., supra, that the Attorney General would prevail. The net effect of a remand would, therefore, be merely to prolong the period during which petitioner's child remains apart from her natural father and without a permanent home. Thus, while petitioner would ordinarily welcome an opportunity to secure relief pursuant to a remand for re-consideration of state law, the remote chance of success, coupled with a recognition that speedy permanent placement of his child is very important, impels petitioner to object to remand to the Supreme Court of Texas.

Should this Court deem remand appropriate, however, petitioner asks that the judgment of the Supreme Court of Texas be vacated and the case sent down for an expeditious hearing on the Attorney General's novel construction of the Texas Family Code.

Respectfully submitted,

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NO. 82-647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DONALD J. KIRKPATRICK,
Petitioner,

v.

CHRISTIAN HOMES OF ABILENE, INC.,
and the 326TH DISTRICT COURT OF
TAYLOR COUNTY, TEXAS,
Respondents.

On Writ Of Certiorari To The Texas Supreme Court

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER UNWED FATHERS WHO HAVE NOT ESTABLISHED A SUBSTANTIAL RELATIONSHIP WITH THEIR NEWBORN NON-MARITAL CHILD POSSESS A FUNDAMENTAL RIGHT TO CUSTODY OF THAT CHILD AND TO FULLY PARTICIPATE IN THE REARING OF THAT CHILD EQUAL TO ALL OTHER CLASSES OF PARENTS.

2. WHETHER THE "BEST INTEREST OF THE CHILD" STANDARD EMPLOYED IN § 13.21, TEXAS FAMILY CODE, IS SO VAGUE OR OVERBROAD SO AS TO RESULT IN AN UNCONSTITUTIONAL VIOLATION OF DUE PROCESS IN ITS APPLICATION.

3. WHETHER THE DISSIMILAR TREATMENT OF UNWED FATHERS CONTAINED IN § 13.21, TEXAS FAMILY CODE, VIOLATES THE EQUAL PROTECTION RIGHTS OF THE PETITIONER UNWED FATHER.

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On Writ Of Certiorari To The Texas Supreme Court

BRIEF FOR RESPONDENT

CONSTITUTIONAL PROVISION

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

Texas Family Code § 13.21. Voluntary legitimation.

(a) If a statement of paternity has been executed by the father of an illegitimate child, the father or mother of the child or the Texas Department of Human Resources may file a petition for a decree designating the father as a parent of the child. The statement of paternity must be attached to the petition.

(b) The court shall enter a decree designating the child as the legitimate child of its father and the father as a parent of the child if the court finds that:

(1) the parent-child relationship between the child and its original mother has not been terminated by a decree of a court;

(2) the statement of paternity was executed as provided in this chapter, and the facts stated therein are true; and

(3) the mother or the managing conservator, if any, has consented to the decree.

(c) The requirement of consent of the mother is satisfied if she is the petitioner. If the entry of the decree is in the best interest of the child, the court may consent to the legitimation of the child in lieu of the consent of the mother or managing conservator.

(d) A suit for voluntary legitimation may be joined with a suit for termination under Chapter 15 of this code.

(e) A suit under this section may be instituted at any time.

STATEMENT OF THE CASE

Baby Girl S. was born on January 11, 1981, and has just recently celebrated her second birthday.[1] The mother of the child, Ms. S., was 15 years old at the conception of Baby Girl S. (J.A. 118a) and Petitioner, the father of Baby Girl S., was 24 years of age at the time of the birth. (J.A. 32a-33a) Ms. S. was 13 years old when Petitioner began his relationship with her. Petitioner and Ms. S. have never married and have never lived together. Petitioner has never participated in the rearing of Baby Girl S., has never had custody or control of Baby Girl S., has never supported Baby Girl S., has never established any emotional or psychological bond with Baby Girl S.,

1. Baby Girl S. was placed in the adoptive couple's home in September of 1982 by Christian Homes of Abilene, Inc. Even though there remained the possibility that Petitioner would seek review of the Texas Court's decision by This Honorable Court, it was felt, at that time, that the possibility of such review was remote because of This Honorable Court's refusal to grant Writ of Certiorari in *In the Interest of T.E.T.* in 1980 (603 S.W.2d 793 [Tex] cert. denied 450 U.S. 1025) and because it was felt that this Court's decision in *Caban v. Mohammed* (441 U.S. 380) was factually distinguishable because the present case involved a newborn child with whom the unwed father had established no substantial relationship. In light of legal precedent which was applicable to Baby Girl S., the decision was made to place the child with the intended adoptive couple because of the emotional and psychological ties which Baby Girl S. was developing daily with her foster family. It was felt that if Baby Girl S. continued to be raised by her foster family, a later disruption of that relationship would not be in her best interest. Even though she remains unadopted, she is establishing a growing relationship with the couple who desires to adopt her.

has never demonstrated any commitment to Baby Girl S. other than his judicial pursuit for custody which is the basis of this appeal, and indeed has never even seen the child.

Ms. S., an adolescent at the time of her pregnancy with Baby Girl S., sought the advice and counseling of her parents upon learning of her unwanted pregnancy. Over a period of time, Ms. S., along with Petitioner, Ms. S.'s parents and Petitioner's parents, considered the limited number of options available to her including marriage, having the child and raising it herself as a single parent, abortion, allowing Petitioner to raise the child as a single parent, or carrying the child full term in order to place the child for adoption. (J.A. 282a, 286a, 314a, 317a, 329a) Ms. S., herself an adopted child, and being relatively aware of the advantages of adoption, carefully considered her choices and chose to give birth to her child and place the child for adoption through Christian Homes of Abilene, Inc., Respondent herein. (J.A. 174a, 177a) Once she had made her decision, she possessed the emotional state of mind to have a medically uncomplicated term and gave birth to a healthy infant girl, Baby Girl S., the child the subject of this appeal.

Petitioner was never quite able to articulate a clear decision as to his future participation with Baby Girl S. until possibly the time of the filing of his petition for voluntary legitimation pursuant to § 13.21, Texas Family Code. (J.A. 137a, 161a, 163a, 167a, 284a, 288a) His ever changing attitude toward the child was always joined with his desire to marry Ms. S. (J.A. 153a, 159a) He was strongly influenced by the attitudes of his family that dictated marriage in all cases of pregnancy despite the

interest or welfare of the innocent child. (J.A. 158a, 272a)

From Petitioner's first knowledge of Ms. S.'s pregnancy until after the birth of Baby Girl S., Petitioner expressed a desire at times to consent to Baby Girl S.'s adoption, a desire at other times to assert his rights to Baby Girl S., a desire at still other times to do whatever Ms. S. wanted (J.A. 163a, 284a, 289a, 342a) and his relative position at any given time was dependent upon who had last talked with him. (J.A. 288a)

Although the Petitioner asserted at trial that he eagerly sought to support the mother during her time of pregnancy and to pay her medical and other related expenses in excess of $4,000.00, the record shows that Petitioner never contacted Christian Homes on that subject and that he in fact has never offered or attempted to pay through Christian Homes those expenses. (J.A. 354a) Although Petitioner asserts that he contributed to Baby Girl S.'s support, the record shows that he began sending one hundred dollars a month to the District Clerk's Office only after the filing of his petition for voluntary legitimation and solely upon the advice of his attorney. (J.A. 216a) Those payments were never received by Ms. S., or by Respondent and those funds were never used for the support or benefit of Baby Girl S. (J.A. 354a) Despite Petitioner's assertions that he was financially capable of providing for Baby Girl S.'s needs and necessities, the record shows that during Ms. S.'s stay at Christian Homes' maternity facilities, he, with the help of his father, only sent to Ms. S. a total of $70.00. (J.A. 194a)

Contrary to Petitioner's alleged eagerness to be informed of the welfare of the child, the record shows that

he never sought to contact Respondent on that subject (J.A. 355a) and that he never expressed interest in or concern for the welfare of Baby Girl S. in conversations with Ms. S. subsequent to the child's birth (J.A. 171a).

At the conclusion of the hearing on Petitioner's suit for voluntary legitimation, the trial court made the observation that Petitioner would be a proper person to have parental rights under perhaps other circumstances, but that those circumstances did not at that time exist. (J.A. 379a) The trial court denied Petitioner's suit for voluntary legitimation finding that it would not be in Baby Girl S.'s best interest. (J.A. 380a) The Court of Appeals for the Eleventh Supreme Judicial District of Texas affirmed the trial court's decision and its opinion is quoted verbatim in the Joint Appendix beginning at page 400a. The Texas Supreme Court denied Petitioner's Application for Writ of Error on July 14, 1982. (J.A. at 415a)

Baby Girl S. remains unadopted although she is daily forming emotional and psychological bonds with the couple with whom she has been and is presently living during a period in her life when the strength of such bonds are greatest and their positive influence for later life firmly grounded.

SUMMARY OF THE ARGUMENT

Petitioner contends that he has the absolute right to participate in the custody and rearing of his child, Baby Girl S., based solely upon the fact of his biological fatherhood, and that because of such absolute right, the state must demonstrate a compelling need before divesting him of parental status. Respondent takes the position that the rights possessed by Petitioner and other unwed fathers

is not an absolute right but is conditioned upon a showing of facts which, in the child's best interest, would merit the legal recognition of the unwed father's parental status. The Texas Family Code, § 13.21, protects the unwed father's constitutionally protected right by allowing him a procedure whereby such a showing can be made. Petitioner employed that procedure in the Texas Court and his due process right to notice and hearing have, therefore, not been infringed.

Nor have Petitioner's due process rights been infringed by the application of the "best interest of the child" standard. Although Petitioner contends that the best interest standard is unconstitutionally vague and overbroad, it is the position of Respondent that such a standard, measured in the light of the unwed father's constitutionally protected rights to his non-marital child, allows the fact finder the ability to demonstrate on a case by case basis what should always be the paramount issue in all cases involving newborn non-marital children: the welfare of the child. Furthermore, by requiring the unwed father to make the requisite showing, the burden of proof is properly placed upon him as the one seeking to establish the parental status.

Petitioner also takes the position that the Texas statutory scheme violates his equal protection rights contending the gender and marital based classifications contained in such § 13.21, Texas Family Code, impermissibly discriminate between unwed fathers and unwed mothers and impermissibly discriminate between unwed fathers and wed fathers. Respondent takes the position that the unwed father is not similarly situated to other classes of "parents" and therefore, the dissimilar treatment con-

tained in § 13.21, Texas Family Code, is not constitutionally repugnant as a violation of equal protection.

Alternatively, even if the unwed father is similarly situated to other classes of parents, the dissimilar treatment serves the important governmental objective of protecting the welfare of the unwed mother and the welfare of the non-marital child, and the distinction contained in § 13.21, Texas Family Code, is substantially related to the achievement of those important governmental objectives. The gender and marital based classifications are, therefore, not violative of due process.

ARGUMENT AND AUTHORITIES

I.

DUE PROCESS

A. Unwed fathers who have not established a substantial relationship with their newborn non-marital child do not possess the same substantive rights to their child as do all other classes of parents.

Petitioner contends that he possesses a fundamental parental right to his non-marital child, Baby Girl S., and that by being so possessed the state cannot disenfranchise him of that fundamental parental right without first demonstrating a compelling need. Petitioner contends that a "best interest of the child" standard is not constitutionally adequate to justify the preclusion of his rights to Baby Girl S. Respondent takes the position that the relative rights of an unwed father are not de-

pendent merely upon the existence of a biological relationship between the father and the child, but rather upon the nexus between that biological relationship and the emotional and psychological bond which may develop between the unwed father and his non-marital child.

Although unwed fathers in Texas are not automatically afforded the status of a parent,[2] there does not exist under Texas law an irrebutable presumption that all unwed fathers are unfit to occupy that status. In fact, the section of the Texas Family Code now under attack[3] provides the procedure whereby an unwed father can establish his parental rights by, among other things, demonstrating that there exists between himself and his non-marital child a sufficient bond so that the judicial recognition of that relationship would be in the child's best interest. Having so demonstrated, the unwed father, under Texas law, attains the legal status of a parent and such status cannot be extinguished but for a showing of unfitness.[4] Unwed fathers in Texas, therefore, who have established a substantial relationship with their children, are not denied due process of law by virtue of the provisions of § 13.21 of the Texas Family Code.

This Court has previously recognized the existence of constitutionally protected rights stemming from the relationship between family members and the bonds of the

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2. Section 11.01(3) *Texas Family Code* provides:
(3) "Parent" means the mother, a man as to whom the child is legitimate, or an adoptive mother or father, but does not include a parent as to whom the parent-child relationship has been terminated.

3. Section 13.21 *Texas Family Code.*

4. Section 15.02 *Texas Family Code* is reproduced in its entirety in the Appendix hereto.

family unit. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the state had prohibited all schools from teaching any subject in any language other than English. The purpose of the statute was to avoid the teaching of ideas foreign to the "best interest of this country". The state's method, however, unconstitutionally interfered with the rights of parents to control the education of their children. This Court in *Meyer*[5] enunciated a liberty right of the individual "to marry, establish a home and bring up children. . . ." Following the *Meyer*[6] decision this Court decided other cases involving state statutes which interfered with the privacy realm of family life.

In 1925 this Court decided *Pierce v. Society of Sisters*, 268 U.S. 510, and held invalid an Oregon mandatory public school attendance statute which prevented parents from sending their children to private schools. In 1942, this Court decided *Skinner v. Oklahoma*, 316 U.S. 535 (1942), which held unconstitutional Oklahoma's Habitual Criminal Sterilization Act. In 1972, this Court decided *Wisconsin v. Yoder*, 406 U.S. 205, which held unconstitutional a Wisconsin statute that compelled Amish to send their children to formal high school until age 16. In 1977, this Court decided *Moore v. City of East Cleveland*, 431 U.S. 494, and held unconstitutional as a violation of due process a housing ordinance which allowed only certain categories of related individuals to live together. The focus of these cases centers upon the sanctity of the family, the integrity of the family unit, and the importance of the interworking of the biological and psychological bonds between parents and children which contribute to the overall development of the child.

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5. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

6. Id., note 5.

Against this backdrop that the private realm of family life is entitled to fundamental protection is the development of family relationships which do not fall within the traditional sphere of the family unit. Living arrangements which have previously been socially unacceptable are becoming more and more prevalent. This Court has recognized that unmarried fathers under certain circumstances make good parents and that their parental rights should be recognized. For that reason, state statutes which universally exclude unwed fathers from the status of parent and which raise an irrebutable presumption as to the unwed father's unfitness without providing a means whereby the unwed father can overcome that presumption are unconstitutional as a violation of due process.

This Court in 1972 first considered the constitutionality of state statutes that deny to unwed fathers certain parental rights granted to unwed mothers, wed mothers and wed fathers in the case of *Stanley v. Illinois*, 405 U.S. 645 (1972). Previously this Court has been confronted with factual situations involving the unwed father and older non-marital children. Previously this Court has been confronted with factual situations wherein the unmarried father has had at least some relationship with the non-marital child beyond the mere biological fact of fatherhood. Previously hereto this Court has been confronted with factual situations where the granting of parental rights to the unwed father would not result in allowing the unwed father to benefit from his illegal conduct.[7] The case now before the Court involves an

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7. Ms. S. was 15 years old at the time she was impregnated by Petitioner who at that time was over 19 years of age. Section 28-319, Rev. Stat. of Nebraska, provides:

Sexual Assault; First Degree; Penalty

Any person who subjects another person to sexual penetration

infant. The only existing relationship between Petitioner and Baby Girl S., whose birth was the result of Petitioner's illegal conduct, is the fact that Petitioner is the biological father.

The facts of *Stanley*[8] were as follows: Joan and Peter Stanley had never married but had lived together intermittently for eighteen years during which time he fathered, raised and supported three children. When the children's mother died, they were declared wards of the state because, pursuant to the Illinois law, they were considered to no longer have any living "parent".[9] Peter Stanley wanted the children to continue living with him but was prevented from doing so because of the irrebutable presumption contained in the Illinois statute that all unwed fathers were unfit to be parents. Although the Illinois law required notice, hearing and proof of unfitness for all other classes of parents prior to the termination of their parental rights, the actual fitness of unwed fathers was deemed irrelevant.

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and (c) the actor is 19 years of age or older and the victim is less than 16 years of age is guilty of sexual assault in the first degree.

Section 28-318 provides that the Court may consider whether or not the victim received serious personal injury as a result of the sexual assault and defines serious personal injury to include pregnancy.

Terms, defined. As used in sections 28-318 to 28-323, unless the context otherwise requires:

. . .

(3) Serious personal injury shall mean great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ;

Section 28-105, Rev. Stat. of Nebraska, provides a maximum penalty for sexual assault of 50 years incarceration in prison.

8. *Stanley v. Illinois*, 405 U.S. 645 (1972).

9. Id., note 8 at p. 558.

This Court disagreed and recognized that meaningful parent-child bonds can be established between an unwed father and his non-marital child. Respondent contends that the holding in *Stanley*[10] does not extend absolute parental rights to all unwed fathers but rather extends to the unwed father, in light of this Court's subsequent holding in *Quilloin v. Walcott*, 434 U.S. 236 (1978), a procedural due process protection of notice and hearing. When the unwed father can demonstrate that his relationship with his non-marital child equals or approximates a marital family relationship by demonstrating an actual reciprocal emotional and psychological bond with the child, such a father should be accorded parental rights commensurate with those of other classes of parents.

The case presently before this Court is distinguishable from *Stanley*.[11] First, the Texas statute involved[12] does not raise the irrebutable presumption that all unwed fathers should never attain the status of a parent. Section 13.21, Texas Family Code, provides the procedure whereby the unwed father can show that his relationship with the non-marital child equals or approximates a marital family relationship thereby affording the unwed father a means by which he can show that it would be in the child's best interest to legally recognize his factual status as a parent.

The second distinction between *Stanley*[13] and the present case is the lack of any relationship between Petitioner and the non-marital child. In *Stanley*,[14] the unwed father

10. Id., note 8.

11. Id., note 8.

12. Section 13.21 *Texas Family Code*.

13. Id., note 8.

14. Id., note 8.

had participated in his children's rearing and had supported the children both emotionally and financially for approximately 18 years. There existed between Peter Stanley and the children a *de facto* parent-child relationship which is lacking in the relationship between Petitioner and Baby Girl S.

Baby Girl S. was a newborn at the institution of Petitioner's original proceeding in Texas and she remains in the status of an unadopted infant. Petitioner has never established a parental relationship with Baby Girl S. Petitioner has never participated in the rearing of Baby Girl S. There has never been established a mutual emotional or psychological bond between Petitioner and the non-marital child. Petitioner has never seen the child, and there does not exist in fact a parent-child relationship between Petitioner and Baby Girl S.

Six years after this Court's holding in *Stanley v. Illinois*,[15] *Quilloin v. Walcott*[16] presented a challenge to a Georgia adoption statute that denied an unwed father the authority to prevent the adoption of his child while granting this veto power to all other living parents who were not found to be unfit or to have abandoned their children.[17] The Georgia consent to adoption statute required the consent of the unwed mother but not that of the unwed father to the adoption of their non-marital child. The issue in *Quilloin*[18] was the constitutionality of the Georgia adoption statute that effectively denied an unwed father the right to prevent the adoption of his non-marital

15. Id., note 8.

16. *Quilloin v. Walcott*, 434 U.S. 236 (1978).

17. Id., note 16 at footnote 2, p. 515.

18. Id., note 16.

child whom he had not legitimated by vesting all parental rights to a non-marital child in the natural mother.

Quilloin[19] involved a petition for the adoption of an eleven year old child by the husband of the child's natural mother. Although Leon Quilloin had acknowledged his fatherhood with occasional support and visits, he had never established a home with the child's natural mother, nor was the child in the custody or control of his father at any time. Unlike Peter Stanley, Leon Quilloin had never "shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child."[20] After receiving notice of the filing of the adoption petition, Leon Quilloin filed a petition to legitimate the child.

Although the trial court gave Quilloin a hearing on his fitness as a parent, it did not expressly find him unfit. Rather, the trial court decided that the adoption by Walcott, the natural mother's husband, was in the best interest of the child. In so doing, the trial court effectively terminated the parental rights of Leon Quilloin even though he had not been found unfit to continue a relationship with his child. The highest court of Georgia affirmed that decision and this Court by unanimous decision affirmed the decisions below.

The importance of this Court's holding in *Quilloin v. Walcott*[21] is its aid in understanding the extent of the holding of *Stanley v. Illinois.*[22] It is Respondent's position

19. Id., note 16.

20. Id., note 16 at p. 520.

21. Id., note 16.

22. Id., note 8.

that not all unwed fathers possess fundamental rights to their non-marital children. If a contrary conclusion were to be drawn from *Stanley*,[23] this Court's decision in *Quilloin*[24] would be inconsistent for the reason that Leon Quilloin could not have lost his parental status absent a finding of his unfitness. Since the best interest standard was applied in *Quilloin*[25] rather than the fitness test, it is Respondent's position that the rights of an unwed father to his non-marital child do not rise to the level of a fundamental right notwithstanding the fact of his biological fatherhood.

Although Peter Stanley may have, and probably did, possess a substantive right to his children because of the *de facto* parent-child relationship that existed between himself and his children, the facts that existed in *Quilloin*[26] did not create such a relationship so as to elevate Leon Quilloin to the status of a *de facto* parent. In *Stanley*[27] this Court stated that a "properly focused hearing"[28] should be afforded unwed fathers in custody and adoption proceedings. While Respondent would not presume to tell this Court what it meant by "properly focused hearing", perhaps the importance of this phrase is that what constitutes a proper hearing is dependent upon the facts of the individual case and the resulting status which the unwed father has attained as a result of those facts. For example, the relationship which Peter Stanley had with

23. Id., note 8.

24. Id., note 16.

25. Id., note 16.

26. Id., note 16.

27. Id., note 8.

28. Id., note 8 at footnote 9, p. 526.

his children equaled or approximated a parent-child relationship associated with all other classes of parents creating the presumptions of commitment associated with such a relationship. Stanley's relationship with his children had been created as a matter of fact and that relationship could only be terminated by showing a compelling reason. After this Court's decision in *Stanley*,[29] the state of Illinois afforded Peter Stanley a hearing properly focused on the issue of child neglect.[30]

On the other hand, the relationship between Leon Quilloin and his child did not as a matter of fact rise to the level of a parent-child relationship. Leon Quilloin had only occasionally visited his child and only sporadically contributed to the child's support. He had never lived with or had custody of the child. Leon Quilloin's relationship with the child was at best tenuous. Therefore, the hearing afforded Leon Quilloin, having not factually attained the plateau of a parent, was properly focused on the child's best interest.

The facts of the present case more approximate the facts of *Quilloin v. Walcott*[31] than they do the facts of *Stanley v. Illinois*.[32] Petitioner, as Leon Quilloin, has never had custody of his non-marital child. Petitioner, as Leon Quilloin, has never participated in the rearing of his non-marital child. Petitioner, as Leon Quilloin, has never contributed to the regular support of his child, although he did, after the filing of his petition to legitimate, deposit money into the registry of the court upon the advice of

29. Id., note 8.

30. "Family Law Cases and Materials"; Judith Areen (1978) p. 155.

31. Id., note 16.

32. Id., note 8.

his attorney. As in *Quilloin*,[33] the child, Baby Girl S., would be adopted by the family with whom she is already living should this Court affirm the decisions below. The hearing in both *Quilloin*[34] and the present case was properly focused on the child's best interest since neither Leon Quilloin nor Petitioner had factually attained the status of a parent.

In 1979 this Court in *Caban v. Mohammed*, 441 U.S. 380 (1979), examined the constitutionality of a New York statute that required only the natural mother's consent to the adoption of her non-marital child.[35] Abdiel Caban and Maria Mohammed had lived together for a five year period between September, 1968, and December, 1973, in New York City during which time they represented themselves as husband and wife although they were never legally married. New York law did not recognize common-law marriage under any circumstances.[36] Caban

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33. Id., note 16.

34. Id., note 16.

35. The New York law provided that consent to adoption was required of only the following individuals or agencies:

(a) Of the adoptive child, if over 14 years of age, unless the judge as surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

(d) Of any person or authorized agency having lawful custody of the adoptive child.

36. *Rahill v. 645 Restaurant Corp.*, 59 App. Div. 2d 988, 399 N.Y.2d 342 (1977).

Texas, however, does recognize common-law marriage. *Humphreys v. Humphreys*, 364 S.W.2d 177 (Tex.) Reh. denied, rev'd. on other grounds.

Had the *Caban* facts existed in the present case, Petitioner's rights to Baby Girl S. could not have been diminished without proof by

had lived with and supported the family until Maria Mohammed left him taking their two children with her. She began living with, and later married, Kazim Mohammed. During the two years that followed, Caban remained in constant contact with the children. In January, 1976, Maria and Kazim Mohammed filed a petition for adoption. Two months later, Abdiel Caban, joined by his wife, filed a cross-petition for adoption. The New York Court granted the Mohammeds' petition basing its decision on the New York statute that provided in part that only the consent of the mother was required in adoptions involving children born out of wedlock.[37] Since Maria Mohammed withheld her consent, Caban was foreclosed from adopting the children. This Court reversed the New York decision holding that a state adoption law that requires only the mother's, and not the natural father's, consent to the adoption of a non-marital child violates the Equal Protection Clause of the Fourteenth Amendment because it bears no substantial relationship to the State's interest in facilitating the adoption of children born out of wedlock.

Although this Court's holding in *Caban*[38] is based upon equal protection principles rather than due process as was *Stanley*[39] and *Quilloin*,[40] an examination of the holding is

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clear and convincing evidence that he had engaged in one or more of the acts or omissions contained in section 15.02 Texas Family Code which is reproduced in its entirety in the Appendix to Respondent's Brief on the Merits, for the reason that there would have existed between Petitioner and Ms. S. the legally recognized relationship of marriage.

37. Id., note 35.

38. *Caban v. Mohammed*, 441 U.S. 380 (1979).

39. Id., note 8.

40. Id., note 16.

helpful in analyzing the nature and extent of the rights of unwed fathers. Since the classification in *Caban*[41] involved gender, this Court applied the intermediate standard of scrutiny.[42] In order for a statute containing a gender based classification to pass constitutional muster, the classification must first serve important governmental objectives and must be substantially related to the achievement of those objectives. This Court recognized the important state objective of promoting the welfare of non-marital children through adoption. The New York statute, therefore, fulfilled the first part of the test. However, the statute failed the second part of the test because this Court found that the gender classification was not substantially related to the articulated state interest.

The importance of the holding in *Caban*[43] is that it illustrates that *Stanley*[44] did not declare a fundamental right in all unwed fathers to their non-marital children. Classifications involving fundamental rights must be measured by the strict scrutiny standard in order to be constitutionally valid under the Equal Protection Clause of the Fourteenth Amendment. *Moore v. City of East Cleveland*;[45] *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticutt*, 381 U.S. 479 (1965); *Kramer v. Union Free School District*, 395 U.S. 479 (1965); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *NAACP v. Button*, 371 U.S. 415 (1963).

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41. Id., note 38.

42. *Craig v. Boren*, 429 U.S. 190 (1976).

43. Id., note 38.

44. Id., note 8.

45. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

While this Court seems willing to grant substantive rights to an unwed father, it has not been willing to give the unwed father the same substantive rights accorded to all parents. Unwed fathers have a constitutionally protected interest in their children and they are entitled to some degree of protection. This Court has, however, been unwilling to raise this interest to the status of a fundamental right.

Since unwed fathers do not ipso facto possess fundamental rights to their children, statutes which exclude them from the definition of a parent but which provide a procedure whereby they can attain that status do not violate procedural due process protection afforded unwed fathers. The statutes involved in *Stanley*[46] and *Caban*[47] did not contain such a procedure but established irrebutable presumptions which precluded the unwed fathers from attaining a participating role in their children's lives. On the other hand, *Quilloin v. Walcott*[48] did contain such a procedure and the constitutionality of the Georgia procedure was unanimously upheld by this Court.

B. The "best interest of the child" standard employed in § 13.21, Texas Family Code, is not so vague or overbroad so as to violate Petitioner's right to due process.

This Court's holding in *Santosky v. Kramer*, 455 U.S. 745 (1982), does not strengthen Petitioner's argument that the Texas statutory scheme involved violates his pro-

46. Id., note 8.

47. Id., note 38.

48. Id., note 16.

cedural due process rights for the reason that *Santosky*[49] involved the termination of an existing parental relationship. In *Santosky*[50] this Court examined the constitutionality of a New York statute that allowed the termination of parental rights on the finding of the child's "permanent neglect", and further required such a finding on a "fair preponderance of the evidence". This Court held that the standard employed by New York was inadequate for the reason that the preponderance standard did not adequately convey to the fact finder the level of subjective certainty about his factual conclusions necessary to satisfy due process. This Court reasoned that since the private interest, i.e. the termination of the already existing parent-child relationship is "commanding and the threatened loss is permanent", a preponderance standard does not "fairly allocate the risk of an erroneous fact finding between the State and the natural parents".

Petitioner's original proceeding was to establish his parental rights to Baby Girl S., and although the ultimate effect of a future adoption of Baby Girl S. will effectively terminate Petitioner's interest in the child, he had not and has not attained that level of status which triggers the application of the *Santosky*[51] holding. If, on the other hand, Petitioner had attained parental status, a showing of his parental unfitness would be required before that status could be terminated. A showing of unfitness would be required by "clear and convincing evidence". The rationale of *Santosky*[52] would therefore be applicable, and

49. *Santosky v. Kramer*, 455 U.S. 745 (1982).

50. Id., note 49.

51. Id., note 49.

52. Id., note 49.

Texas courts would apply that standard pursuant to the Texas Supreme Court's holding in *In Re G.M.*, 596 S.W. 2d 846 (Tex. 1980).

Petitioner further contends that the "best interest of the child" standard as contained in § 13.21, Texas Family Code, is unconstitutionally vague and over-broad. Respondent does not question that statutes which forbid or require the doing of an act in terms so vague that men of common intelligence must guess at its meaning are constitutionally invalid. *Lanzetta v. New Jersey*, 452 U.S. 18 (1981). Nor does Respondent question that even a clear and precise enactment may nevertheless be over-broad if in its reach it prohibits constitutionally protected conduct. *Grayned v. Rockford*, 408 U.S. 104 (1972). Respondent does, however, question Petitioner's assertion that the statute in question which employs a "best interest of the child"[53] standard is either unconstitutionally vague or unconstitutionally over-broad.

The constitutionally protected right which unwed fathers such as Petitioner possess in their non-marital child is the procedural due process right to notice and hearing in any suit affecting their interest in their non-marital child. Respondent does not believe that the best interest standard is unconstitutionally vague. The standard employed in establishing an otherwise non-existent parental right must be flexible so as to afford each individual case the degree of scrutiny which such an important decision deserves. Any standard containing rigidly itemized characteristics which must be attained before the establishment of the legally recognized status of a parent would surely be struck down as excluding certain com-

53. Id., note 3.

binations of attributes which would necessarily occur because of the very complexities of human life. By utilizing a "best interest" standard, the fact finder can consider the relative merits of all concerned including, as involved in this case, the benefit which Petitioner would derive from his illegal liaison with Ms. S. which resulted in the ultimate birth of Baby Girl S.

How is the "best interest" standard over-broad? The constitutionally protected interest involved in the present case is Petitioner's procedural right to demonstrate his commitment to Baby Girl S., thereby showing that it would be in the child's best interest to allow him to be recognized as a parent. The "best interest" standard, rather than being over-broad, is restrictive for the reason that it requires the fact finder to focus in on the limited question of the welfare of the child while at the same time allowing each case to be decided on its own individual merit. A standard which provides for the establishment of a parent-child relationship must not only protect the rights of the unwed father but also the rights of the mother and perhaps most importantly the rights of the innocent child. Although Petitioner criticizes the "best interest of the child" standard as being too broad and too vague, such a standard provides guidance for the fact finder in cases in which an examination of the rights of unwed parents may be inadequate. The standard employed by Texas provides the opportunity to give objective evidence of the "best interest" of the child so that the various controversies concerning the rights of both the natural and adoptive parents would not overshadow what should be the ultimate concern of any adoption proceeding: the welfare of the child.

II.

EQUAL PROTECTION

A. Fathers of newborn non-marital children are not similarly situated to unwed mothers or to wed fathers. Therefore, the dissimilar treatment of unwed fathers contained in § 13.21, Texas Family Code, does not violate the equal protection rights of Petitioner.

Petitioner contends that there is an impermissible gender based as well as an impermissible marital based classification contained in § 13.21, Texas Family Code, because as Petitioner contends, unwed fathers are treated differently than are unwed mothers and unwed fathers are treated differently than are wed fathers. Petitioner contends that all unwed fathers are similarly situated to unwed mothers and wed fathers and that the dissimilar treatment contained in § 13.21, Texas Family Code, violates his equal protection rights.

The function of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is to measure the constitutional validity of classifications created by state laws. *Parham v. Hughes*, 441 U.S. 347 (1979). In cases where individuals are not similarly situated, however, and a statutory classification is realistically based upon the differences in their situations, this Court has upheld its validity.[54] *Reed v. Reed*, 404 U.S. 71.

The Texas statutory scheme presumes all wed and unwed mothers and all wed fathers to be "parents".[55] Unwed

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54. *Parham v. Hughes*, 441 U.S. 347, 60 L.Ed.2d 269, 99 S.Ct. 1742.

55. Id., note 2.

fathers do not possess this presumption and must employ the provisions of § 13.21, Texas Family Code, to establish such status by showing the child's best interest. The presumed parents, however, cannot be divested of their parental status but for a showing of unfitness together with a showing of best interest pursuant to § 15.02, Texas Family Code. The reason for the dissimilar treatment, Respondent contends, is based upon the fact that unmarried fathers do not in all cases necessarily share a similar commitment and are not otherwise similarly situated to the newborn child as is the mother or the wed father.

Mothers exhibit their actual commitment to their children by carrying and bearing their children. Ms. S. exhibited such a commitment. Wed fathers are presumed by law to be committed to their offspring. All children born within the institution of marriage are presumed to be legitimate offspring of the father and it is presumed that the father will contribute to the development of the child's mental health by his day-to-day interaction with them. Unwed fathers, however, have been entitled to no such presumption because they are situated differently than mothers and wed fathers.[56]

The Texas Supreme Court has recognized the fact that unwed fathers are not similarly situated to the unwed mother. Justice Barrow writing the majority opinion in *In the Interest of T.E.T.*, 603 S.W.2d 793 (Tex.) cert. denied, 450 U.S. 1025, stated at page 797:

> The mother, by virtue of her pregnancy, is automatically responsible for the child. She has the physical

56. "Doctrine of Family Integrity: Protecting the Paternal Rights of Unwed Fathers Who Have Substantial Relationships With Their Children." Con. L. Rev. 13:145, p. 155.

> burden and responsibilities of the pregnancy. She can choose to abort the child or she can carry it full term. . . .
>
> On the other hand, the biological father is not automatically responsible for the child. He may not have an interest in legitimating the child. He may not promptly disclose his interest in the child. In most situations, he can wait until after the child is born before committing himself. While the mother who is unmarried and pregnant is trying to figure out what she will do with the child, the father is totally free from any responsibility with respect to the child. To classify him as a parent simply because he is the biological father would give him a powerful club with which he could substantially reduce the options available to the unmarried mother. All must agree that an unmarried fourteen year old high school freshman has a serious problem when she discovers she is pregnant and she needs all the options that the State can properly make available to her.

This Court has acknowledged the fact that young women and men are not similarly situated with respect to the problems and risks associated with intercourse and pregnancy. In the case of *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464 (1981), (a case involving the California statutory rape statute) Justice Stewart in his concurring opinion stated:

> Young men and women are not similarly situated with respect to the problems and risks associated with intercourse and pregnancy, and the statute is realistically related to the legitimate State purpose of reducing those problems and risks.

Justice Stewart reasoned that pregnant unmarried females confront different and more severe problems than their male partners and stated:

> She alone endures the medical risk of pregnancy or abortion. She suffers disportionately the social, educational, and emotional consequences of pregnancy. Recognizing this disproportion, California has attempted to protect teenage females by prohibiting males from participating in the act necessary for conception.

Justice Rehnquist expressed even stronger views which were joined by Chief Justice Burger, Justice Stewart and Justice Powell:

> We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and risks of sexual intercourse. Only women may become pregnant and suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity. . . .
>
> Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. . . .

Justice Rehnquist continued:

> But we find nothing to suggest that men, because of past discrimination or particular disadvantages, are in need of the special solitude of the courts. Nor is this a case where a gender classification is made "solely for administrative convenience" . . . or rests on "the baggage of sexual stereotypes" . . . as we have held, the statute instead reasonably reflects that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male.

In *Caban v. Mohammed*[57] this Court in the majority opinion alluded to the fact that, in matters concerning newborns, the unwed father may not be similarly situated to the unwed mother. At page 305,[58] Justice Powell writing for the majority stated:

> Even if unwed mothers as a class were closer than unwed fathers to the newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinction as the age of the child increased.

The concern which the dissent in *Caban* had was that the majority opinion would receive too broad an interpretation endangering the welfare of newborns and infants. The dissenters addressed both the dissimilar status of unwed fathers to unwed mothers and the dissimilar status of unwed fathers to wed fathers. Addressing the marital distinction, Justice Stewart stated at page 310:[59]

> The constitution does not require that an unmarried father's substantive parental rights must always be coextensive with those afforded to the fathers of legitimate children. In this setting, it is plain that the absence of a legal tie with the mother provides a constitutionally valid ground for distinction.

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57. Id., note 38.

58. Id., note 38.

59. Id., note 38.

Addressing the gender classification Justice Stewart stated beginning at page 311:[60]

> With respect to a large group of adoptions—those of newborn children and infants—unwed mothers and unwed fathers are simply not similarly situated . . . Our law has given the unwed mother the custody of her illegitimate children precisely because it is she who bears the child and because the vast majority of unwed fathers have been unknown, unavailable, or simply uninterested. . . .
>
> Men and women are different, and the difference is relevant to the question whether the mother may be given the exclusive right to consent to the adoption of a child born out of wedlock. Because most adoptions involve newborn infants or very young children, it is appropriate at the outset to focus on the significance of the difference in such cases.
>
> Both parents are equally responsible for the conception of a child out of wedlock. But from that point on through pregnancy and infancy, the differences between the male and the female have an important impact on the child's destiny. Only the mother carries the child; it is she who has the constitutional right to decide whether to bear it or not. In many cases, only the mother knows who sired the child, and it will often be within her power to withhold that fact, and even the fact of her pregnancy, from that person. If during pregnancy the mother should marry a different partner, the child will be legitimate when born and the natural father may never even know that his "rights" have been affected. On the other hand, only if the natural mother agrees to marry the natural father during that period can the latter's action have a positive impact on the status of the child; if he instead should

60. Id., note 38.

marry a different partner during that time, the only effect on the child is negative, for the likelihood of legitimacy will be lessened. These differences continue at birth and immediately thereafter. During that period, the mother and child are together; the mother's identity is known with certainty. The father, on the other hand, may or may not be present; his identity may be unknown to the world and may even be uncertain to the mother. . . .

There no doubt are cases in which the relationship of the parties at birth makes it appropriate for the State to give the father a voice of some sort in the adoption decision. But as a matter of equal protection analysis, it is perfectly obvious that at the time and immediately after a child is born out of wedlock, differences between men and women justify some differential treatment of the mother and father in the adoption process.

Most particularly, these differences justify a rule that gives the mother of a newborn infant the exclusive right to consent to its adoption. Such a rule gives the mother, in whose sole charge the infant is often placed anyway, the maximum flexibility in deciding how best to care for the child. It also gives the loving father an incentive to marry the mother, and has no adverse impact on the disinterested father. Finally, it facilitates the interests of the adoptive parents, the child, and the public at large by streamlining the often traumatic adoption process and allowing the prompt, complete, and reliable integration of the child into a satisfactory new home at as young an age as is feasible.

With this much the Court does not disagree; it confines its holding to cases such as the one at hand involving the adoption of an older child against the wishes of the natural father who previously has participated in the rearing of the child and who admits paternity.

The statute involved in *Caban*[61] was found unconstitutional because the distinction found in the New York statute was not substantially related to the achievement of the state's important objective of promoting the welfare of non-marital children through adoption. Under the factual situation contained in *Caban*[62] the children were older and the unwed father had established a substantial relationship with his children. In *Caban*,[63] Abdiel Caban and Maria Mohammed were similarly situated because of the relationship which had developed over approximately seven years between Abdiel Caban and his children. They were also similarly situated because they were both legally able to consent to the sexual act which ultimately resulted in Maria's pregnancy, whereas Ms. S. was not.

In the present case, Petitioner has not established such a parental relationship with Baby Girl S. At the hearing on Petitioner's suit to legitimate, Petitioner was not similarly situated to Ms. S. because she had already demonstrated her commitment to Baby Girl S. by carrying the child and giving birth. The depth of her commitment was evidenced by her decision to give up the child and to place it in a home for adoption where she knew it would be raised by two mature parents who could properly provide for the child. (J.A. 177a) Ms. S.'s commitment was demonstrated by her realization that she, as a fifteen year old single parent, could not properly provide for the child. (J.A. 178a) Her commitment was demonstrated by her realization that Petitioner, whom she knew probably better than anyone else, was not capable to best

61. Id., note 38.

62. Id., note 38.

63. Id., note 38.

care for her child and that if her child was relinquished to Petitioner, Baby Girl S. would be raised by surrogate part-time parents including Petitioner's parents, grandmother and sisters, none of whom have demonstrated any commitment to the child, but who have demonstrated rather that "marriage, right or wrong" is the only alternative to non-marital pregnancy.

B. The gender and marital based classifications contained in § 13.21, Texas Family Code, serve the important governmental objections of protecting the welfare of unwed mothers and non-marital children, and those classifications are substantially related to the achievements of those important governmental objections. Therefore, the classifications contained in § 13.21, Texas Family Code, do not violate Petitioner's rights to equal protection.

Although Respondent does not feel that Petitioner and Ms. S. were similarly situated and does not feel that the unwed fathers of newborns in general are similarly situated to unwed mothers of newborns, if this Court decides that they are, the dissimilar treatment contained in § 13.21, Texas Family Code, fulfills the two-pronged test applied in *Caban v. Mohammed*[64] and therefore, the dissimilar treatment contained in § 13.21, Texas Family Code, does not violate the equal protection rights of the unwed father.

In *Caban*[65] this Court recognized that the state has an important objective in protecting the welfare of children

64. Id., note 38.

65. Id., note 38.

born out of wedlock through adoption. The Texas Supreme Court, in upholding the constitutionality of § 13.21, Texas Family Code,[66] recognized the State's objective in promoting the welfare of non-marital children and also recognized the State's interest in the welfare of the unwed mother. Justice Barrow writing the majority opinion in *In the Interest of T.E.T.*[67] stated at page 797:

> The State has a substantial interest in encouraging the unwed mother to properly care for the child by assuring her that her wishes as to the disposition of the child will not, absent her consent or a finding of the child's best interest, be subject to the absolute veto of the biological father. This statute is substantially related to the achievement of that interest.

In regard to the State's objective in promoting the welfare of the child, Justice Barrow stated at page 797:[68]

> The narrow issue before us is whether the gender based distinction of the Texas statutory scheme for establishing status as a parent is substantially related to the important State objective of promoting the best interest of children born out of wedlock and is substantially related to the achievement of this objective. We hold that it is so related.

The statute involved in *Caban*[69] failed to be substantially related to the articulated state interest and was therefore, held to be an unconstitutional violation of equal

66. *In the Interest of T.E.T.*, 603 S.W.2d 793 (Tex.) cert. denied 450 U.S. 1025.

67. Id., note 64.

68. Id., note 66.

69. Id., note 38.

protection. It is Respondent's position that § 13.21, Texas Family Code, is substantially related to the achievement of promoting the welfare of the unwed mother by allowing her the decision-making capability concerning her unborn child free from the absolute veto of the unwed father. Furthermore, § 13.21, Texas Family Code, is substantially related to the achievement of promoting the welfare of newborn children by allowing their prompt adoption while at the same time providing the concerned unwed father the capability of establishng parental rights, thus arming him with veto authority of the child's adoption.

Furthermore, the state has a legitimate interest in having the ability to quickly place the newborn child for adoption. As observed in *Caban*,[70] statistics from New York which appear to approximate the national average indicate that 90% of children adopted are under the age of six, that 66% of all children adopted are under the age of one, and that 75% of all adoptive parents prefer to adopt a child under the age of three years. The median age of a child at the time of adoption appears to be five months.

A concerned unwed father is protected by the provisions of § 13.21, Texas Family Code, which allows him the procedure to show his relationship with his child. By providing a workable procedure for the state to place the infant or newborn for adoption at an optimal age, and by likewise providing a procedure for the protection of the concerned unwed father, Texas protects not only its interest in the welfare of the non-marital child but does so in a manner which does not arbitrarily or unconstitutionally infringe on the rights of the concerned unwed father.

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70. Id., note 38 at footnote 7, p. 7.

This Court held that the New York statute involved in *Caban*[71] was unconstitutional because it was not substantially related to the articulated state objective. This Court reasoned that the State cannot assume that an unmarried mother always has a closer relationship with her child and that her interest in the child is always more important so that only her consent is merited in adoption proceedings. It is Respondent's position that in cases involving newborn children, the state can properly assume that the mother bears a closer relationship with her child whom she has chosen to carry full term as long as the assumption is not irrebutable. It is not irrebutable in Texas. Section 13.21, Texas Family Code, provides the procedure whereby the concerned unwed father can overcome that assumption by demonstrating on a case by case basis his relationship with the child thereby showing that the child's best interest would be served by allowing legal recognition of his factually existent parentage.

This Court also reasoned in *Caban*[72] that the New York statute was not substantially related to the articulated state objective for the reason that there was no basis for assuming that the unwed father would consent to adoption any less frequently than the unmarried mother thereby hindering the important state objective of promoting adoption of non-marital children. Because of the affirmative procedure contained in § 13.21, Texas Family Code, the concerned unmarried father can assert his interest in the child and therefore, there does not exist under § 13.21, Texas Family Code, the universal assumption which this Court found repugnant in *Caban*.[73]

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71. Id., note 38.

72. Id., note 38.

73. Id., note 38.

Finally, this Court reasoned in *Caban*[74] that the New York Statute was constitutionally infirm for the reason that even if it might be difficult to locate and identify an unwed father at birth, possibly justifying a distinction between unmarried mothers and unmarried fathers, this problem could decrease after infancy. It is Respondent's position that this last reason stated by this Court in holding the New York statute over-broad is precisely the justification for the distinction employed by Texas in not automatically treating unwed fathers as parents. If the mere fact of biological fatherhood created fundamental parental rights in all biological fathers, the state would be required in all unmarried births to seek out all concerned and all unconcerned fathers as well as all "rapists, sperm donors, and hit-and-run lovers",[75] before any child could begin establishing the family bond to which that child has a constitutionally protected right and which the state has a valid objective in protecting.

CONCLUSION AND PRAYER

Although unwed fathers possess certain constitutionally protected rights to their non-marital children, this Court has in the past refused to recognize in the unwed father an absolute right to his children. Because of the state's statute involved in *Stanley v. Illinois*,[76] Peter Stanley was denied his right to continue in the rearing of his non-marital children with whom he had established a substantial relationship. This Court properly held that under

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74. Id., note 38.

75. Id., note 66 at p. 795.

76. Id., note 8.

those facts, Stanley's due process rights to his children were unconstitutionally violated.

Quillion v. Walcott,[77] demonstrated this Court's desire to limit the protection afforded unwed fathers, under proper factual circumstances, to a procedural protection. Unwed fathers have not in the past been afforded the same substantive due process rights to their non-marital children as have other classes of parents.

This Court's latest pronouncement of the rights of the unwed father occurred in *Caban v. Mohammed*,[78] a case which involved the right of an unwed father who had established a substantial relationship with his older non-marital children to veto their adoption. Although decided on equal protection grounds, the test employed by this Court to measure the constitutionality of the New York statute which contained a gender based classification demonstrated again this Court's unwillingness to recognize a fundamental right in the unwed father to his non-marital children.

Respondent urges this Court, based upon the procedural safeguards enunciated in *Stanley*[79] and *Quilloin*[80] and the equal protection safeguards enunciated in *Caban*,[81] to recognize the constitutionally protected rights of unwed fathers but to do so in the limited posture set forth in *Stanley*[82] where the unwed father has established a substantial relationship with his child, and to strictly limit

77. Id., note 16.

78. Id., note 38.

79. Id., note 8.

80. Id., note 38.

81. Id., note 8.

82. Id., note 38.

the application of *Caban*[83] to factual situations involving older children with whom the unwed father has established a parental bond. Respondent urges this Court not to extend the application of *Caban*[84] to the facts of the present case which involves a newborn with whom the unwed father has not established any relationship.

The Texas Family Code, § 13.21, provides the procedure whereby the unwed father can demonstrate the commitment which he has to his newborn child. Petitioner employed that procedure and fully participated at the hearing but failed to make the requisite showing of Baby Girl S.'s best interest. Petitioner's right to Baby Girl S. have not been violated as he has been provided the procedure by which he was allowed to attempt to demonstrate the existence of a relationship between himself and his child.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the holdings of the Courts below be in all things AFFIRMED.

Respectfully submitted,

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83. Id., note 38.

84. Id., note 38.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of Respondent's Brief on the Merits have been mailed to Marcia Robinson Lowry, Counsel of Record for Petitioner, American Civil Liberties Union Foundation, 132 West 43rd Street, New York, New York 10036, postage prepaid, return receipt requested and that three (3) copies of Respondent's Brief on the Merits have been mailed to Counsel of Record for the State of Texas, David R. Richards, Executive Assistant Attorney General of the State of Texas, P. O. Box 12548, Austin, Texas 78711, on the _____ day of March, 1983.

CHARLES E. MYERS

APPENDIX

TEXAS FAMILY CODE

Section 15.02. Involuntary Termination of Parental Rights

A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:

(1) the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return; or

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months; or

(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months; or

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; or

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; or

(F) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition; or

(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence; or

(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth; or

(I) contumaciously refused to submit to a reasonable and lawful order of a court under Section 34.05 of this code; or

(J) been the major cause of:

(i) the failure of the child to be enrolled in school as required by the Texas Education Code; or

(ii) the child's absence from his home without the consent of his parents or guardian for a substantial length of time or without the intent to return; or

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by Section 15.03 of this code; and in addition, the court further finds that

(2) termination is in the best interest of the child.

No. 82-647

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

DONALD J. KIRKPATRICK,
Petitioner

V.

CHRISTIAN HOMES OF ABILENE, INC.,
and the 326TH DISTRICT COURT OF
TAYLOR COUNTY, TEXAS,
Respondents

ON WRIT OF CERTIORARI TO THE
TEXAS SUPREME COURT

BRIEF FOR RESPONDENT, STATE OF TEXAS

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March, 1983

QUESTION PRESENTED FOR REVIEW

Does the Texas statutory scheme involving the relationship of out-of-wedlock children to their biological fathers, taken as a whole, violate the biological father's constitutional right to due process and equal protection of the laws?

THE PARTIES

The State of Texas is a party to these proceedings pursuant to 28 U.S.C. § 2403(b).

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STATEMENT OF THE CASE

The State of Texas is satisfied with the factual recitations in petitioner's Statement. However petitioner's description of the Texas legitimation statute has failed to present an accurate picture of the genuine even-handedness and fundamental fairness afforded unwed fathers in superseding legislation involving the determination of paternity. The comprehensive statutory scheme is described below.

SUMMARY OF ARGUMENT

Petitioner has challenged the facial constitutionality of the Texas voluntary legitimation statute (Texas Fam. Code § 13.21), on grounds that it violates the due process and equal protection rights of unwed fathers. This statute was enacted in 1973. In 1975

the Texas legislature enacted Texas Fam. Code § 13.01 et seq. which guarantees to unwed fathers all of the rights asserted by petitioner in his brief to this Court. Because the State of Texas has already provided due process and equal protection for its unwed fathers, this Court should dismiss the writ of certiorari as improvidently granted and allow petitioner to replead his case in the Texas courts.

ARGUMENT

I. THE TEXAS STATUTORY SCHEME ADEQUATELY PROTECTS THE RIGHTS OF UNWED FATHERS.

A. The Texas Statutory Scheme

In 1975, the Texas legislature enacted Texas Family Code § 13.01 et seq. fully set forth in Respondent's Statutory Appendix. Sec. 13.01 provides that a suit to establish the parent-child relationship between an out-of-wedlock child and the child's biological father

may be brought within four years of the child's birth.[1/] The suit to establish paternity may be brought by the mother, the father, or other interested person. Texas Fam. Code § 11.03. The intention of the legislature to allow the biological father to bring a paternity action is made clear by the plain language of § 13.02(b):

> An order issued under this section is enforceable by contempt, except that if the petitioner is the mother or the alleged father and refuses to submit to the blood test, the Court shall dismiss the suit. If the respondent is the mother or the alleged father and refuses to submit to the blood test, the fact of refusal may be introduced as evidence as provided in Section 13.06(d) of this Code. (emphasis added).

1/ Petitioner's daughter is now only two years old.

See also, Commentary by John J. Sampson, Texas Tech Family Law Symposium, Vol. 13: 897, 904. Texas Fam. Code, § 11.09(a)(9) also provides that notice of any paternity proceeding will be given the alleged father, unless the alleged father is the petitioner. The conscious sex-neutrality of the Texas paterntiy statutes is evident throughout the legislative scheme and is in keeping with the Texas Equal Rights Amendment to the Texas Constitution. Tex.Con.Art. 1, § 3a.

The Texas paternity statutes provide that if the alleged father is found to be the biological father he is automatically designed as a "parent", with all the rights and duties inuring to all legitimate parents. Texas Fam. Code § 13.09. See also Commentary of John Sampson, supra at 915. Once a father is designated as a parent, his parental rights

may not be terminated except pursuant to Texas Fam. Code § 15.02.

B. The Texas Statutory Scheme Adequately Protects The Rights of Unwed Fathers To Due Process.

Texas Fam. Code § 11.09(a)(8) provides that the alleged father or "probable father" must be notified of any suit in which the termination of the parent-child relationship is sought. It was under this provision that the petitioner was notified of the impending adoption of his daughter. Petitioner could have brought a paternity action under Texas Fam. Code § 13.01. Since the actual paternity of petitioner's daughter is not in dispute (J.A. at 106a), petitioner would have been automatically designated as a "parent" under the provisions of the Texas paternity statutes. Under Texas Fam. Code § 15.02, petitioner's parental rights could not

have been terminated unless the State District Court:

(a) found the petitioner to be "unfit" (Tex. Fam. Code § 15.02 (1)(A-K);

(b) with the burden of proof on the party seeking termination (Compasano v. State, 576 S.W.2d 100 (Civ. App. 1978));

(c) by clear and convincing evidence (Flowers v. Texas Dept. of Human Resources, 629 S.W.2d 891 (App. 1982)).

Petitioner does not challenge the adequacy of Texas Fam. Code § 15.02.

C. The Texas Statutory Scheme Adequately Protects The Rights of Unwed Fathers To Equal Protection of the Laws.

Under the Texas paternity statutes, the unwed father is treated differently from the unwed mother in only

two respects, neither of which reach constitutional significance. First, the unwed father must affirmatively initiate some action to be recognized as a parent. This requirement reflects the reality that the identity of the alleged father is often either unknown or uncertain. Petitioner has not claimed that the mere burden of coming forward violates equal protection and this court has never held that all unwed fathers must be treated identically to unwed mothers. Caban v. Mohammed, 441 U.S. 380 (1979); Quillion v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972). The second difference is that the Texas paternity statutes include a statute of limitations. Petitioner here

is well within the statute of limitations.[2/] Furthermore, in recognizing that identical treatment is not constitutionally mandated for all unwed fathers, this Court has specifically excluded from equal treatment those unwed fathers who fail to accept parental responsibility in a timely fashion. Quilloin v. Walcolt, supra.

II. THE TEXAS PATERNITY STATUTES HAVE EFFECTIVELY NEGATED THE TEXAS VOLUNTARY LEGITIMATION STATUTE AS APPLIED TO PETITIONER.

The Texas Code Construction Act, Texas Civil Statute Art. 5429b-2, provides that if statutes are irreconcilable the latest in date of enactment

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2/ Whether such a statute of limitations may be constitutionally applied to the child is not properly raised in this case.

prevails. Sec. 3.06. The Texas paternity statutes were enacted in 1975 and are the most recent pronouncement of the rights of unwed fathers under Texas law. To the extent that the voluntary legitimation statute required a finding of "best interest" prior to legitimation, it has been negated by subsequent passage of the Texas paternity statutes which require only a finding of biological relationship. See, Commentary by John J. Sampson, supra at 905.

Petitioner did, and still does, have a fundamentally fair and even-handed remedy under state law. The fact that he chose a more onerous legal course--one superseded by subsequent legislation--should not justify this court's intervention.

CONCLUSION

For all the foregoing reasons, Respondent State of Texas respectfully requests this Court dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

JIM MATTOX
ATTORNEY GENERAL OF TEXAS

By _____
David R. Richards
Executive Assistant
Attorney General
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March 16, 1983

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 1983, a copy of the Brief For Respondent, State of Texas was mailed postage prepaid to the following counsel of record:

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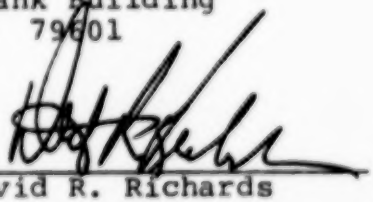

David R. Richards

STATUTORY APPENDIX

Chapter 13. Determination of Paternity

SUBCHAPTER A. PATERNITY SUIT

Section 13.01. Time Limitation of Suit

A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is four years old, or the suit is barred.

Section 13.02. Pretrial Proceedings: Blood Tests

(a) When the respondent appears in a paternity suit, the court shall order the mother, alleged father, and child to submit to the taking of blood for the purpose of one or more blood tests. If the appearance is before the birth of the child, the court shall order the taking of blood to be made as soon as medically practical after the birth.

(b) An order issued under this section is enforceable by contempt, except that if the petitioner is the mother or the alleged father and refuses to submit to the blood test, the court shall dismiss the suit. If the respondent is the mother or the alleged father and refuses to submit to the blood test, the fact of refusal may be introduced as evidence as provided in Section 13.06(d) of this code.

Section 13.03. Pretrial Proceedings: Appointment of Experts

(a) The court may appoint one or more experts qualified as examiners of blood types to make the blood tests. The court may determine the number and qualifications of the experts and shall prescribe the arrangements for conducting the tests.

(b) The court may fix a reasonable fee for each court-appointed examiner and may require the fee to be paid by any or all of the parties or by the Texas Department of Human Resources, if the department is a party of the suit, in the amounts and in the manner directed, or the court may tax all or part or none of the fee as costs in the suit.

(c) A party may employ other qualified examiners of blood tests. The court may order blood samples made available to these examiners if requested.

Section 13.04. Pretrial Proceedings: Conference

(a) After completion of the blood tests, the court shall order all parties to appear, either in person or by counsel, at a pretrial conference. The court shall call its appointed examiners to testify in person or by deposition about their tests and findings. A party may call other qualified examiners of blood tests to testify.

(b) Witnesses called by the court are the court's witnesses, and witnesses called by a party are that party's witnesses. The court and the parties may examine and cross-examine all witnesses.

(c) All evidence presented at the pretrial conference is a part of the record of the case.

Section 13.05. Pretrial Proceedings: Effect of Blood Tests.

(a) At the conclusion of the pretrial conference, if the court finds that the tests show by clear and convincing evidence that the alleged father is not the father of the child, the court shall dismiss the suit with prejudice.

(b) If the court finds that the blood tests fail to show by clear and convincing evidence the alleged father is not the father of the child, the court shall set the suit for trial.

Section 13.06. Evidence at Trial.

(a) Unless otherwise permitted by the court on a showing of good cause, a party may call to testify on the results of the blood tests only those experts who testified at the pretrial conference.

(b) A witness called by a party at the trial is that party's witness.

(c) If the blood tests show the possibility of the alleged father's paternity, the court may admit this evidence if offered at the trial.

(d) Evidence of a refusal by the respondent to submit to a blood test is admissible to show only that the alleged father is not precluded from being the father of the child.

Section 13.07. Settlement

The child must be a party to a settlement agreement with the alleged father. The child shall be represented in the settlement agreement by a guardian ad litem appointed by the court. The court must approve any settlement agreement, dismissal, or nonsuit.

Section 13.08. Decree

(a) On a verdict of the jury, or on a finding of the court if there is no jury, that the alleged father is the father of the child, the court shall issue an order designating the alleged father as the father of the child.

(b) On a verdict of the jury, or on a finding of the court if there is no jury, that the alleged father is not the father of the child, the court shall issue an order declaring this finding.

Section 13.09. Effect of Decree Establishing Paternity.

The effect of a decree designating the alleged father as the father of the child is to create the parent-child relationship between the father and the child as if the child were born to the father and mother during marriage.

Office-Supreme Court, U.S.
FILED
MAR 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-647

IN THE

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OCTOBER TERM, 1982

DONALD J. KIRKPATRICK,

Petitioner,

—v.—

CHRISTIAN HOMES OF ABILENE, INC., and the 326th DISTRICT COURT OF TAYLOR COUNTY, TEXAS,

Respondents.

ON WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

BRIEF AMICUS CURIAE OF NANCY S. ERICKSON, THE NATIONAL CENTER ON WOMEN & FAMILY LAW, INC., AND THE COMMITTEE FOR MOTHER AND CHILD RIGHTS, ON BEHALF OF UNWED MOTHERS.

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Interest of Amici

Amicus Nancy S. Erickson is a Professor of Law at the Ohio State University College of Law, teaching family law, constitutional law, and sex discrimination. Her concern with this case is that the interests of unwed mothers are not being argued by any party to this action. She wishes to help the Court to avoid a holding or even dictum that might adversely affect the rights of unwed mothers in the cases that will surely arise hereafter.

The National Center on Women & Family Law, Inc. (NCOWFL) is a private, not-for-profit organization incorporated under the laws of the State of New York for the purpose of providing legal assistance to poor women. A significant proportion of NCOWFL's constituency is comprised of unwed and single mothers. The issues raised by the instant case, including the constitutional right of privacy of the unwed mother and

her right to elect and secure adoption for her child, are of central concern to NCOWFL and its constituency.

The Committee for Mother and Child Rights is an organization of approximately 500 members in thirty states. One of its concerns is that courts and legislatures should recognize the maternal risks and burdens of pregnancy and childbirth in enacting and enforcing laws concerning the custody and welfare of children.

It is the view of Amici that unwed mothers are entitled to a voice in a case such as this that so vitally affects them. Traditionally, the unwed mother has been seen simply as a source for babies to be adopted and not as a human being with needs of her own. "Sympathy for the [unwed] mother was not altogether absent, but she was really not to be considered except to relieve her of an intolerable burden." C. PRENTICE, AN ADOPTED CHILD

LOOKS AT ADOPTION 92 (1940).

Because unwed mothers usually want to preserve their anonymity, there is no known public organization of unwed mothers that could submit an amicus brief in this case.*

Amici in this brief will present the views of unwed mothers who have chosen adoption. Amici have solicited letters from actual unwed mothers asking them to tell this Court, in their own words, why it was important to them to have the adoption alternative available and what effect it would have had on their decision-making processes if the father's consent had been necessary for the adoption. Portions of

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*There is an organization called The Concerned United Birth Parents, made up of parents who have given up their children for adoption, but the purpose of that group is to lobby for "open adoption records" laws; thus, that group would not be representative of the many unwed mothers who do want to retain their anonymity and should be represented in this case.

these letters are quoted in this brief.

Amici are also concerned that a decision by this Court requiring unwed mothers and unwed fathers to be treated exactly the same will result not in an increase of rights to the unwed father, but in a decrease of rights to the unwed mother. Specifically, the States could view a decision by this Court requiring exact equality between the sexes as permitting the termination of an unwed mother's rights to her child on a best interests standard. Because the mother has more of a substantive due process interest in raising the child than does the father, this result should not be permitted.

All parties have consented to the filing of this brief, and their consents have been filed with this Court.

SUMMARY OF ARGUMENT

Texas law provides that an unwed mother may surrender a child for adoption shortly after birth without the consent of a biological father who has not legitimated the child, although he must be given notice. A biological father who wishes to legitimate the child, thus obtaining the right to veto an adoption, may do so with the mother's consent. If she refuses to consent, her consent may be dispensed with if the court finds that to do so would be in the best interest of the child. Texas Fam. Code §13.21.

The Texas statutory scheme does not violate any substantive due process rights of Petitioner. If a man is involved in a sexual relationship with a woman for recreation, not procreation, but pregnancy accidently occurs, the State has not deprived him of any constitutional right to decide whether to "beget a child."

Eisenstadt v. Baird, 405 U.S. 438 - (1972). Birth control failure, not the State, has deprived him of that right. Thereafter, the right to decide whether to continue the pregnancy belongs to the woman alone. Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

The due process privacy interest also encompasses a "freedom of personal choice in matters of family life." Santosky v. Kramer, 445 U.S. 745 (1982). However, the Texas statutory scheme does not violate any "family life" interest of Mr. Kirkpatrick's (hereinafter Mr. K.) because he was never part of Baby Girl S.'s family, in the sense of a person who lives or has lived with another person on a day-to-day basis. That was the definition of "family" in Santosky and other "family life" cases of this Court.

Here the existing "family" is the

family of mother and child. The mother did not, by marriage or otherwise agree to have a family relationship with Mr. K., and none can be forced upon her. Loving v. Virginia, 388 U.S. 1 (1967). Mr. K. claims he is entitled to establish such a family, but he is not. The State is not obligated to create a family that the biological parents have not created by themselves.

But even assuming that an unwed father solely by virtue of biological connection to a child has substantive due process privacy rights, they may be affected or even terminated by the State if the State demonstrates a compelling state interest for doing so and shows that the statutes are necessary to achieve that compelling state interest. Zablocki v. Redhail, 434 U.S. 374 (1978).

Here there are four compelling state interests underlying the Texas statutory

scheme. First, Texas' interest in the welfare of the child is furthered by encouraging the unwed mother to make plans for the child that are in the child's best interest. The Texas law ensures her that if she carries to term she will have full control over decisions concerning the child, unless those decisions are not in the best interest of the child. Relieving her of the fear that the biological father will overrule her plans is in the best interests of the child because maternal stress is harmful to the fetus (see citations infra).

The State's second compelling state interest is the interest in preserving the woman's right to choose whether or not to bear the child. Roe v. Wade, 410 U.S. 113 (1973). A woman must know, before she makes the abortion decision, that if she foregoes that constitutionally-protected right, and incurs the life and health

risks of pregnancy and childbirth, the State will assure her that her plans for the child's future will be followed, unless they are not in the child's best interests.

The third compelling state interest at stake is the interest in safeguarding the unwed mother's right to anonymity and right not to have a relationship with the child if she wishes to place it for adoption.

This Court has recognized as fundamental an interest in avoiding disclosure of personal matters. Whalen v. Roe, 429 U.S. 589 (1977). Even if the State is not constitutionally required to afford the unwed mother this protection, it may assert a compelling state interest in doing so by statute, especially where to fail to afford her this protection would be to encourage "black market" adoptions and to encourage some unwed

mothers to retain custody of the child where they are too young or in no position to do so, leading to high school drop-outs, loss of job or career prospects, and children growing up on public assistance.

Denial of the anonymity that adoption affords would be especially damaging to the mother in this case, because she must return to her parents' home in the small town where Mr. K. also lives, so that meetings with the child, even accidental, would be unavoidable.

The fourth compelling state interest served by the Texas statutory scheme is the interest in preventing the exploitation of women as unwilling breeders for males who desire children but have not found women who are able and willing to bear children for them. That such exploitation is a real possibility is evidenced by the growing practice of the hiring of surrogate mothers and by at least

one reported case. W.E.J. v. Superior Court, 160 Cal. Rptr. 862, 100 Cal. App. 3d 303 (Ct. of Appeal, 2d Dist. 1979).

The Texas statutory scheme is necessary to the achievement of these compelling state interests; there is no alternative scheme that would serve the state interests as well and would put less of a burden on whatever interests the unwed father might have.

In fact, a law giving him even fewer rights would be constitutional. For example, a law such as N.Y. Dom. Rel. L. 111-a(2)(c), which requires a potential father to sign a "putative fathers' registry" if he desires notice and a hearing to object to placement of the child for adoption would be constitutional even if it required such a filing within a short time after conception. A man knows with whom he has had sexual relations; if he wishes any rights with regard to the child, it is no

undue burden on him to require him to assert these rights before the time for the woman to obtain a safe abortion has passed.

If the Texas statutory scheme passes the compelling state interest test, it must, by definition, pass the equal protection test of Craig v Boren, 429 U.S. 190 (1976). Thus, there is no impermissible sex classification in the law. Additionally, Mr. K. is a strange advocate of men's equal rights to raise children when his trial testimony indicated that he intended to leave all childcare responsibilities to the women in his family -- mother, sister or grandmother.

Finally, the best interests standard is not constitutionally vague, especially as applied here. The best interests standard is used by judges in every jurisdiction every day in divorce custody cases and is used in many jurisdictions, not just Texas, for cases such as this.

Even if this Court finds constitutional violations, its decision should not be applied retroactively, to the date of this child's conception, by giving this father adoption veto rights. Finally, if he is to receive any more rights than the many substantive and procedural rights that Texas has already given him, the court on remand must give Ms. S. an opportunity to reassert her rights. In making its decision, the court on remand should also keep in mind that the best interests of the child, now over 2 years old, may lie with the couple she now lives with and views as her parents, even in the event that Mr. K. gets a veto over their adopting her.

ARGUMENT

I. THIS COURT SHOULD DISMISS THE WRIT IN THIS CASE AS INPROVIDENTLY GRANTED, BECAUSE THE VIEWPOINT OF UNWED MOTHERS IS UNREPRESENTED HEREIN, AND THAT VIEWPOINT IS INDISPENSABLE TO A PROPER CONSIDERATION OF THE ISSUES. IF THIS COURT DOES NOT DISMISS THE WRIT, IT SHOULD APPOINT AN ATTORNEY AD LITEM TO REPRESENT THE INTERESTS OF UNWED MOTHERS.

The unwed mother in this case, Ms. S., was represented by a guardian ad litem at the original hearing. Neither that attorney nor any other attorney on her behalf has participated in any steps of the appeal process. Because of the nature of this case, that is not surprising. The mother, believing that adoption was in the best interests of the child and also desiring the anonymity that adoption could afford to her, is unlikely to want to continue to be involved in this action. Nor do we think that she should be asked to become involved. However, as a class,

unwed mothers who desire to give up their children for adoption should be represented in this action, for their viewpoints are indispensable to a proper consideration of the issues.

Several states give to unwed fathers who have established their biological paternity or whose paternity is not disputed the right to veto an adoption. However, no studies exist of the effects on the unwed mother and the adoption process of the father's veto rights. Indeed, many of these statutes were enacted in reaction to Stanley v. Illinois, 405 U.S. 645 (1972), so at most ten years have elapsed since their enactment. That ten years of experience has not been documented to an extent that would make it possible for Amici to provide statistics on the effects of paternal vetoes. Thus, we urge this Court to dismiss the writ in this case and to avoid

any broad holdings regarding unwed fathers' vetoes of adoptions for a reasonable time until such studies can be compiled.

With regard to time, it also should be noted that Caban v.Mohammed, 441 U.S. 380 (1979) was decided only four years ago, so that many adoption agencies and individuals who had believed that Stanley was a case involving procedural rights only have had a mere four years to revamp their laws in light of Caban.

If this Court does not dismiss the writ in this case, it should appoint an attorney ad litem to represent the interests of unwed mothers. An attorney ad litem appointed by this Court would have the financial resources and time to more fully document the issues discussed herein.

II. THE TEXAS STATUTORY SCHEME CHALLENGED HERE DOES NOT VIOLATE THE SUBSTANTIVE DUE PROCESS RIGHTS OF THE UNWED FATHER BECAUSE IT IS NECESSARY TO THE ACHIEVEMENT OF COMPELLING STATE INTERESTS.

A. Unwed Fathers' Substantive Due Process Rights Regarding an At - Birth Adoption.

The right to privacy includes the right to decide, without undue governmental interference, "whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438 (1972). In this case, the state has not interfered with Mr. K.'s decision to beget a child. In fact, Mr. K. never decided to be a parent. This child was conceived against the wishes of the unwed individuals, by accident. Mr. K. had no expectation of enjoying parental rights. His only expectation was enjoyment of a sexual relationship.* Thus, the Texas statutes do not interfere

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*Ms. S. had the same expectation originally; however, pregnancy altered that expectation. Thereafter, she had to take on parental duties unless she decided to abort. Along with those parental duties she would get parental rights.

with any constitutionally protected decision to beget a child.

This Court has also spoken of the right to privacy as encompassing "freedom of personal choice in matters of family life." Santosky v. Kramer, 445 U.S. 745, 753 (1982), citing Quilloin v. Walcott, 434 U.S. 246, 255 (1978), Smith v. Organization of Foster Families, 431 U.S. 816,845 (1977), Moore v. City of East Cleveland, 431 U.S. 494 (1972)., Cleveland Board of Education v.La Fleur, 414 U.S. 632 (1978), Stanley v. Illinois, 405 U.S. 645 (1972), Prince v. Massachusetts, 321 U.S. 158 (1944), Pierce v. Society of Sisters, 268 U.S. 510 (1925), Meyer v. Nebraska 262 U.S. 390 (1923).

Those cases have indicated that the interest of natural parents in the care, custody, and management of their child is a fundamental liberty interest. Mr. K. argues that this liberty interest applies

to all "natural parents" by virtue of their biological relationship to the child.

Even if that is so, this Court has never declared that right to be absolute. The state may impinge on a fundamental right if there is a compelling state interest for doing so and no less burdensome alternative is available. Zablocki v. Redhail, 434 US.374 (1978). We have delineated below (II B and II C) these compelling interests here and the lack of less burdensome alternatives.

Petitioner takes his argument one step farther, however. He quotes the following language of this Court:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt the breakup of a normal family over the objection of the parents and their child, without some showing of unfitness and for the sole reason that to do so was thought to be in the child's best interest." Quilloin v. Walcott, 434 U.S. 246,255 (1978).

Mr. K. claims that this language is applicable to the facts of his case. It is not. This Court held that language inapplicable to the facts of Quilloin. That language is also inapplicable to Mr. K.

Here the natural family is mother and child. The unwed biological parents have not agreed to marry, so if the mother kept the child, Mr. K. would never become part of the child's family. He has a biological connection to the child that may deserve recognition of some sort, and he might eventually develop a relationship to the child if the court permitted visitation, but he would never become part of the child's family in the sense of a person who lives or has lived with another person on a day-to-day basis.

It is that definition of family, we

believe, that this Court had in mind in Quilloin and Stanley v. Illinois, supra. Peter Stanley had lived with his children and their mother for many years as a family.

Mr. K claims that he wants the opportunity to establish such a family. However, the State is under no obligation to create a family that the biological parents have not created for themselves. They neither married nor lived together as a de facto family unit like Joan and Peter Stanley.

B. The Texas Laws Serve Compelling State Interests.

The Texas Statutory Scheme permits the mother to place the child for adoption over the objection of the biological father unless legitimation by the father is found to be in the child's best interests. This statutory scheme serves at least four compelling state interests.

First, the state has a compelling interest in promoting the best interests of the child. The Texas statutes ensure an unmarried, pregnant woman that if she carries the pregnancy to term she will have full control over decisions concerning the child unless such decisions are not in the child's best interests. As the Texas Court of Civil Appeals stated in this case:

> [T]he State has a legitimate interest in protecting the children who are born as a result of pre-marital sexual activity. The mother, by virtue of her pregnancy, is automatically responsible for the child. She has the physical burdens and responsibilities of the pregnancy. She can choose to abort the child or she may carry it full term. The state has a substantial interest in encouraging the unwed mother to properly care for the child by assuring her that her wishes as to the disposition of the child will not, absent her consent or a finding of the child's best interest, be subject to the absolute veto of the biological father. In re Baby Girl S., 628 S.W. 2d 261, 264 (Tex Ct. of

Cir. App. 1982), quoting from In the Interest of T.E.T., 603 S.W. 2d 793, cert. denied sub nom. Oldag v. Catholic Charities, 450 U.S. 1025 (1980).

No study has ever been made of what effect a paternal adoption veto would have on the unwed mother (see Part I, supra). Ms. S testified that in such an event, she would have to reconsider her surrender of the child (J.A. 343a) because the child would be better off with her than with Mr. K (J.A. 186a). We urge this Court to listen to the voices of other actual unwed mothers faced with such a veto power or considering what effect such a veto power would have had on their decisionmaking.

D. H.* writes from a state that requires the biological father's consent:

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* Initials (not the real initials) are used to protect the mothers' anonymity. Signed originals are on file with Amicus Erickson, who assured anonymity to these unwed mothers.

I was married to the father of my first child, but he left us a few months after she was born. At the time of our divorce he was ordered by the judge to pay $100.00 a month in child support. To this date, I have received $60.00 total for the four years. . . . He has also refused to relinquish his parental right. . .

I do not have at the present time a home, a car, or a job. Therefore, I am unable to provide even the basics of life. Motherhood has been a constant struggle for me. I do not want to bring another child into this type of "hand to mouth" existance. If the father will not give his consent, I will be <u>forced</u> to keep this child despite my feelings that it would be in the child's best interest to be adopted.

In my opinion, for our situation, adoption would be the "ultimate love." I think I deserve the opportunity to make this decision of love for my child.

S. S. states:

Should the father have contested my decision to place the baby for adoption, and should he have had the legal right to do so, I believe my ultimate decision could have been drastically different. As little as he was involved in the pregnancy, I

> believe I can question what his commitment as a father would have been. Although it's hard to predict how I'd have reacted if he had threatened the adoption, I believe I would have fought for custody myself to raise the baby.
>
> The possibilities of that father's right raises fear in me now. It concerns me so, because, in my case, I was not ready then to be a mother, much less a single mother. I might later have resented my child, who would certainly not have been at fault, for causing me to drop out of college, etc. And, most importantly, my child might not have been raised in a secure family environment of acceptance and love that every child needs and deserves.

As these letters illustrate, the decision to permit adoption is often the most mature* decision and the one conduc-

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* Several studies have shown that unwed mothers who choose adoption rank as relatively more mature on scales of psychological adjustment. See, e.g., Blum & Resnick, Adolescent Sexual Decision - Making: Contraception, Pregnancy, Abortion, Motherhood, 11(10) PEDIATRIC ANNALS 797 (1982); Grow, Today's Unmarried Mothers: The Choices Have Changed, 58 CHILD WELFARE 363 (1979). Thus, birth mothers who choose adoption cannot be stereotyped as selfish and immature individuals who

ive to the best interests of the child.

To allow the pregnant woman to make the choice she believes is in the child's best interests also serves those interests by allowing her to have peace of mind thereafter during her pregnancy. It has been medically documented that stress suffered by a pregnant woman may have serious detrimental effects on the fetus.**

The State has a second compelling state interest here, the interest in preserving the woman's fundamental right

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(* con't. pg. 25) want to quickly rid themselves of undesired responsibilities by handing over their children to others. Rather, it appears that in most cases they agonize over the decision and try to make it in the child's best interests. The State has a compelling interest in encouraging them to do so.

**See, e.g., Gorsuch & Key, Abnormalities of Pregnancy as a Function of Anxiety and Life Stress, 36 PSYCHOSOM. MED. 352 (1974); Picone et. al., Pregnancy Outcome in North American Women II: Effects of Diet, Cigarette Smoking, Stress, and Weight Gain on Placenta, and on Neonatal Physical and behavioral Characteristics, 36 AM. J. CLIN. NUTR. 1214 (1982).

to choose whether or not to bear a child. In re Baby Girl S., supra, 628 S.W. 2d at 264.

This Court stated in Roe v. Wade, 410 U.S. 113, 153 (1973), that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." If the woman has this decision-making right, then the State must have the power to preserve the purity of her decision-making process and the power to prevent her from being coerced in one direction or the other, especially for the private interests of one individual.

In the context of the facts of cases such as this, the State may assert an interest in making sure that the woman is not pressured into having an abortion against her own true wishes, out of fear of losing the child to the potential father in a custody battle (if she wants

custody) or fear that her adoption plans for the child will be thwarted by him. S. J., now residing in an unwed mother's home in Texas, writes:

> [A]lthough the choice would have been extremely difficult, I would have had to consider abortion. I don't think I could go through a full-term pregnancy on my own, knowing I never could provide [via adoption] the kind of life I want for [the child].

Not even a pregnant woman's husband may demand that a fetus be either aborted or carried to term over the objection of the pregnant woman herself. Planned Parenthood v. Danforth, 428 U.S. 52 (1976). Because that is so, it must be the case that an unwed potential father also lacks any such right.

The pregnant woman needs to be able to know, when she makes the decision whether or not to abort, that if she foregoes that constitutionally-protected right, the State will assure her that her

plans for the child's future will be followed, unless they are not in the best interests of the child. That is precisely what the Texas law does.

The third compelling state interest at stake here is the interest in safeguarding the unwed mother's fundamental right to anonymity and right not to have a relationship with the child if she decides to give it up for adoption.

In Whalen v. Roe, 429 U.S. 589, 599-600 (1977), the Court stated:

> The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.

For brevity, we will call these the "non-disclosure interest" and the "liberty" interest, respectively.

The liberty interest has been deemed

the source of a birth mother's right to anonymity in at least two cases. In Margaret S. v. Edwards, 488 F. Supp. 181, 189, n. 16 (E.D. La. 1980) (dictum), the court identified the right of privacy of the birth mother who has given up a child for adoption as a fundamental liberty interest, citing Massey v. Parker, 362 So. 2d 1195, 1199 (La. App. 4th Cir. 1978) writ granted, 363 So. 2d 1385 (La. 1978)(Schott, J., dissenting). The liberty interest could be deemed the source of this right because if a woman has a right to choose to abort, her decision to bear the child and give it up for adoption should be given the same level of protection. Further, the choice to place the child for adoption, a choice no one except a parent may make, is an exercise of the parental right to control the care, custody, and upbringing of the child. See Pierce, Meyer, and Stanley v.

Illinois, supra. In a marital setting, or in a setting such as in Stanley v. Illinois, supra, or Caban v. Mohammed, 441 U.S. 380 (1979), where the parents have lived together and raised their children together, both parents have that custodial right. In other contexts the unwed mother alone has that custodial right.* She is the "primary caretaker parent."**

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*See Texas Fam. Code §12.01, 12.04, 15.03, 16.03(d). A similar custodial right is the right to name the child. Traditionally, unwed mothers have the exclusive right to name their children based on having the care, custody, and control of the children as legal parents. This is still the law in most jurisdictions, and custodial mothers of marital children are now seeking the same right. In re Marriage of Schiffman, 28 Cal. 3d 640, 169 Cal. Rptr. 98, 620 P.2d 579 (1980) (Mosk J., concurring). Statutory provisions giving unwed fathers superior naming rights to mothers have been invalidated as unconstitutional. Roe v. Conn., 47 F. Supp. 769 (M.D. Ala. 1976); Jones v. McDowell, 281 S.E. 2d 192 (N.C. App. 769 M.D. Ala 1976). See generally MacDougall, Women's Names and the Naming of Children: Recognition of Women's Rights, ____ WOMEN'S RTS L. RPTR. __ (1973).

**Garska v. McCoy, 278 S.E. 2d 357 (W. Va. 1981).

The non-disclosure interest has been found by other courts to be the source of the birth parent's anonymity right.

This Court first discussed the non-disclosure privacy interest in Whalen, supra, citing Stanley v. Georgia, 394 U.S. 557 (1969) and Olmstead v. United States, 277 U.S. 438 (1928). This Court reaffirmed the existence of that interest in informational privacy in Nixon v. Administrator of General Services, 433 U.S. 425 (1977), stating that individual interest in avoiding disclosure of personal matters" is an element of the right of privacy. Id. at 457.

The Second Circuit found such a non-disclosure privacy interest in Alma Society v. Mellon, 601 F.2d 1225 (2d Cir. 1979), where it upheld the validity of a New York statute requiring the sealing of adoption records.

Even if the right of non-disclosure

in the adoption context were not a fundamental right, a state would have a compelling interest in protecting that right if it chose to do so. In Catholic Charities of the Archdiocese of Dubuque v. Zalesky, 232 N.W. 2d 539 (1975), the Iowa Supreme Court recognized just such a state interest in protecting the confidentiality of adoption proceedings and the privacy of unwed mothers. Id. at 548-549. See also In the Matter of Linda F., 52 N.Y.2d 236, 239 (1981) (natural parents retain a potentially strong interest in maintaining their anonymity); In the Matter of the Adoption of E.W.C., 89 Misc. 2d 64, 67 (Surrogate Court, Nassau Co. 1976) (unwed mothers' threatened privacy may lead to socially undesirable routes to the placing of children); and Mills v. Atlantic City Dept. of Vital Statistics, 148 N.J. Super. 302 (1977) (confidentiality of sealed adoption records).

Letters to Amici from several birth mothers indicate the importance to them of the confidentiality that adoption affords. R. T. writes:

> The reason why it is important to have the alternative of adoption available to me is because at a young age I will need time to live my life the right way and not the wrong way . . . [C]onfidentiality is important to me because I really think this [pregnancy] is a mistake and not something I want eveyone knowing because I have a life to live and need all the time to get over this and I don't want all my friends to know . . . ."

Indeed, confidentiality is often a most critical factor for a pregnant woman in deciding whether to proceed with an adoption through legal channels rather than pursuing some other course, legal or illegal, which she would not consider in her own best interest or in the best interest of the child. If this Court declares a paternal adoption veto to exist, it must be expected that women in the future will be discouraged and fearful

of placing their children for adoption. Indeed the inescapable lesson will be that unless a woman can successfully conceal the father's identity*, she can only protect the privacy and anonymity of her circumstances by choosing abortion, even if she wishes to carry the fetus to term, or blackmarket adoption or, indeed, retention of the child herself when she knows that would not be in the best interest of the child. The problems caused to the State when young girls keep their children when unprepared to do so are manifold: the girls often drop out of school, their job prospects are forever ruined or diminished, and their children grow up on public assisance.

The fourth compelling state interest served by the Texas statutory scheme is

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* C.K. writes: [If the father could veto adoption] I [and others] would lie like crazy . . .[although the bad result would be that] these babies' biological backgrounds would be hazy messes."

the interest in preventing the exploitation of women as unwilling breeders of babies for males who desire children but have not found women who are able and willing to bear children for them.

At least one reported case shows that this is a realistic concern. W.E.J. v. Superior Court, 160 Cal. Rptr. 862, 100 Cal. App. 2d 303 (Court of Appeal, 2d Dist. 1979).* In W.E.J., the unwed mother, Ms. G., released her baby for adoption. The biological father, Mr. L., appeared at the adoption hearing. He testified that he was, at the time of the conception and at the time of the hearing, married to a woman other than Ms. G., and that his wife was unable to bear

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* Amicus Erickson also knows of a similar unreported case in Cleveland in which a married man sought visitation rights with regard to his child who was born to a married woman (not his wife) whom he had impregnated.

children. He also testified that at the time the child was conceived, Ms. G. agreed that Mr. and Mrs. L. would raise the child; in return Mr. L. agreed to support her during the pregnancy and postpartum period. He testified that he lived up to his part of the bargain but she did not. The trial court granted him custody on a mistaken view that California law* required it because he was without question the biological parent.

The appeals court held the alleged agreement immaterial, stating that an agreement between parents respecting custody does not limit the power of the court. Because Mr. L. was not a "presumed father" under California law, the court further held he was not entitled to veto the adoption and not entitled to custody, although the court on remand would have to

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*Cal. Civ. Code §7004.

consider whether custody to him would be in the best interests of the child.

In the course of its opinion, the W.E.J. court quoted the warning of a noted legal scholar:

> The extreme view that all unmarried fathers are to be accorded equal custody rights with the mother (and on a par with married fathers) would have disastrous consequences for the child. Every unmarried father would then have the power to block an adoption by withholding consent, and would be in a position to remove the child from the mother. It is one thing to recognize the father's custodial rights when father and mother are living together as a de facto family, or when the children live with the father. California law accords the father custody rights under such circumstances. It is quite another matter to extend equality of custody to the father who is a stranger to the child. [Fn. omitted.] Bodenheimer, New Trends and Requirements in Adoption Law and Proposals for Legislative Change, 49 S. CAL. L. REV. 10, 57-58 (1975).

The law review article's concerns about "disastrous consequences for the

child" are well founded. There could also be disastrous consequences for the mother.

In the W.E.J. case the biological father claimed there had been an agreement between him and the mother but the actual facts underlying W.E.J. could just as easily be either of the following: (1) knowing of his wife's inability to have children, Mr. L. could have had a sexual relationship with Ms. G. for the purpose (not revealed to her) of later claiming the child, thus obtaining the benefits of a surrogate mother with little expense, or (2) desiring simply to have an extra-marital affair with Ms. G., Mr. L. could have accidently caused the pregnancy; then when the pregnancy became known, he could have determined to take advantage of the situation to get the child for his childless marriage.

Each of these two scenarios would cause the same amount of oppression to the

unwed mother in that in each case she would be the one who would suffer severe detriments from the pregnancy and childbirth while the person who suffered not at all would reap the benefit of a newborn child for his childless home (if, upon birth, it was a healthy, appealing baby; if not, he could simply make no claims to it and the mother again would be burdened with planning its future).

In Roe v. Wade, supra, this Court enumerated the detriments that may flow from childbearing, including physical and mental health damages. Id. at 113. Those detriments still occur today.

In this age of advanced medical technology, we tend to block out the fact that pregnancy and childbirth are still physically hazardous and sometimes fatal for women. This Court will recall that Weinberger v. Wiesenfeld, 420 U.S. 636

(1975) involved a father whose wife died in childbirth. In terms of the case at bar, the childbearing mortality of women of Ms. S.'s age at birth of the child is many times greater than the mortality rate for first trimester abortion. LeBolt et al., Mortality from Abortion and Childbirth: Are the Populations Comparable? 248 JAMA 188, 189 (1982). Thus, a woman who forgoes her right to abort increases her risk of death drastically.

Serious complications of pregnancy also continue to be more common than we would hope. WILLIAMS OBSTETRICS, 16th ed., at 535, 594, 908, 683, 665, 487, 859-75, 701-74 (1982). Then there are what physicians call the "common" or "minor" complaints of pregnancy, which would not seem minor to persons undergoing them. Id. at 322-23.

For a woman whose religious or moral

beliefs preclude abortion, and for women who do not realize they are pregnant or who deny it until the pregnancy is quite advanced, pregnancy and childbirth are physically dangerous and emotionally wrenching experiences. To add to this the stress and pain of knowing that the biological father has a right to the child even when the mother and a court would both agree that the child's best interests lie elsewhere would put an unconscionable burden on the pregnant woman.

As E. M. states:

> I am the person who is carrying this child. Not he. I am the person whose mental and physical health take risks. Not his. [sic]

All of the physical and psychological stresses that accompany pregnancy and childbirth are bad enough when the unwanted pregnancy is a result of an accident. How much more oppressive it would be if caused by the premeditated <u>plans</u> of a man bent on using the woman -

or girl - as a surrogate mother without her consent.

This Court should not countenance a rule giving a biological father the right to veto an adoption of a child that would be in the child's best interest, especially when such a right could be used for (and probably would encourage) the oppression of women, especially young, naive, and inexperienced ones such as Ms. S.

C. There are no less intrusive alternatives to the current Texas statutory scheme; in fact, Texas gives unwed fathers far more rights than the Constitution requires

Even assuming that Mr. K. has a substantive due process interest in a child who is connected to him by biology alone, this interest may be overcome by a showing that a statute impinging on that right is necessary to the achievement of the compelling State interests above.

A statute is "necessary" to achievement of a compelling state interest if no less intrusive means are available.

Here, no less intrusive alternative to the Texas statutory scheme is available to cover cases such as the one at bar.* Petitioner has suggested none.

Petitioner urges a requirement that the biological father be proven unfit before disallowing legitimation. An unfitness standard would not achieve the State's compelling state interests. It would not serve the State's interest in protecting freedom of choice because a hearing on unfitness could not be conducted within the time constraints for a safe abortion. An unfitness standard would

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* The Texas Law may have constitutional defects as to fathers such as Peter Stanley and Abdiel Caban, with whom the mothers of the children at issue had entered into family relationships, but Mr. K. is not similarly situated to them and so may not complain of this. See Broaderick v. Oklahoma, 413 U.S. 601, 610 (1973)

also not serve the State's interest in preventing the exploitation of women as unwilling breeders of babies for men. In most cases, such a hidden motive for causing pregnancy would be impossible for a court to ferret out so as to label the man unfit.

In fact, the Texas law gives the unwed father more rights than he is constitutionally entitled to receive. For example, there is no reason why Texas could not require an unwed potential father to file a notice of intent to legitimate the child within, let us say, five days from the time when he knows or should know of a possible pregnancy, even if the pregnant woman never informs him of the pregnancy, or be forever barred from asserting any rights to any resulting child.

The State could constitutionally pass such a law for the following reasons. It

is more than reasonable to assume that unwed males are having sexual relationships for recreation, not procreation. Those who do not intend to procreate should not receive any rights. An unwed male who is having sex for procreation can be assumed to know the name and address of the woman he is attempting to procreate with and the dates on which they had sexual relations. If he is sincere about wanting to procreate, he can simply file a notice of intent to legitimate the child within five days of every sexual act. If he does not, it is no one's fault but his own if he is given no rights to the child who may result from that act.

There is no state now with a law such

as the hypothetical law just described,* but if such a law were passed, there is no reason why this Court should not uphold it.

It would not violate the potential unwed father's substantive due process rights because the state has a compelling state interest in protecting a woman's right to choose to abort or bear the child and she needs to know of any potential claims to the child before the time to safely abort passes.

Our hypothetical law also would not violate his procedural due process rights. In essence, it is a type of

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* There are state laws with some similarities, however. The New York statute (N.Y. Dom Rel. L. §111 - a(2)(c)) currently under consideration by this Court in Lehr v. Robertson, No. 81-1756, requiring a potential father to sign a "putative fathers' registry" is far more generous to the unwed father than the hypothetical statute. Thus, there is no reason why the New York statute should not be upheld.

notice of claim requirement * with a short statute of limitations. Since he knows that a child might result from any act of intercourse, and since a short statute of limitations is necessary to achieve the State's compelling state interests, there would be no procedural due process violations. The fact that the law does not require the pregnant woman to notify him of the pregnancy is irrelevant. There is no reason why he should receive notice - he has notice of a potential pregnancy by reason of the sexual act.

The Texas law gives an unwed father-to-be many more rights than our hypothetical statute. Texas law provides no means by which the pregnant woman can unilaterally cut off all of his rights to notice and a hearing on the best interests of the child before the birth of the

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* Cf. N. Y. Gen. Municipal L. §50-e (notice of claim must be served on defendant within 90 days of tort).

child. He does not need to put in a notice of claim within a short period of time after intercourse or, indeed, at any time before receipt of notice that the mother intends to place the child for adoption. Like the statute upheld in Quilloin, supra, which contains a "best interests" standard, the Texas statute permits a legitimation action long after the child's birth. Finally, the Texas law also affords an unwed father a best interests hearing after the birth under all circumstances, when it would be constitutional to afford him no hearing of any sort unless he requested one early on in the pregnancy.

Because the Texas law affords the unwed father far more than that to which he is constitutionally entitled, it must be upheld.

III. THE TEXAS STATUTORY SCHEME DOES NOT VIOLATE EQUAL PROTECTION; IT IS NECESSARY TO THE ACHIEVEMENT OF COMPELLING STATE INTERESTS AND DOES NOT CARRY THE "BAGGAGE OF SEXUAL STEREOTYPES."

Mr. K. has argued that the Texas statutory scheme incorporates an impermissible gender bias. This argument has no merit. The proponent of a facially sex-based statute must bear the burden of demonstrating that the statute is substantially related to an important governmental objective. Mississippi University for Women v. Hogan, 73 L. Ed. 2d 1090, 1098 (1982), quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981).

Here the State of Texas has met that burden. As we have demonstrated above, the Texas statutory scheme is necessary to the achievement of compelling state interests. If it passes the higher "strict scrutiny" test, it automatically passes the Craig intermediate level of scrutiny.

The Texas Statutory Scheme contains no sexual stereotypes that portray men as incapable of good parenting. There is no evidence that men are inherently less capable than women of raising children.* Petitioner does not need myriad citations (Pet. Br. at 71-72) to prove that point. Texas nowhere denies it.

Furthermore, factually this is an anomalous case in which to make such a claim. When asked about care for the child, Mr. K. always referred to his mother, who would have to quit her job to do so (J.A. 202a; 213a; 264a), his sister (J.A. 202a), or his grandmother (J.A. 209-210a). It never seemed to occur to him that he -- not the women in his family -- would be ultimately responsible for the child's care. It never seemed to occur to

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*With the exception of breastfeeding

him that perhaps a time might come when all of the women in his family might be engaged in other pursuits and he might have to hire a babysitter or quit his own job to take care of the child. His sole testimony on the issue of his own care of the child was as follows:

Q. Will you take care of the child at night?

A. Yes.

Q. You understand that taking care of a child is a lot of work?

A. Yes, I do.

Such perfunctory answers, together with the rest of his testimony, hardly indicate that he put much thought into the question of his own care of the child.

Even his own mother never testified that, on his own, Mr. K. would be capable of caring for the child. (J.A. 253a).

Amici do not argue that just because an unwed father's childcare plans include relatives, the plans are inadequate. It

is admirable and healthy for relatives to assist each other. On the Record in this case, however, a judge would be compelled to conclude that Mr. K. was planning to take virtually no personal responsibility for the care of his child, and that an award of custody to him would really be an award of custody to his mother or sister, who have no legally enforceable right to such custody.

Via Petitioner's brief (at 17, note 1) we are now informed that Mr. K. has married, that his wife is expecting a child in July, and that "Mrs. Kirkpatrick is a full-time homemaker and joins in her husband's desire to raise the daughter." Id. Yet another woman appears to take over the childcare responsibilities.

Petitioner seems to be arguing that awarding custody to fathers will contribute to the breakdown of sex-role stereotyping. However, that will be true

only if the father truly performs the primary nurturing function. If his mother, sister, grandmother, or new wife peforms that function, traditional sex roles will remain intact.

IV. THE BEST INTERESTS OF THE CHILD TEST IS NOT NEATLY MATHEMATICAL, BUT AN UNFITNESS STANDARD WOULD NOT SERVE THE COMPELLING STATE INTERESTS INVOLVED HERE.

The best interests of the child test is not perfect. It is not a mathematical formula that can be applied to reach a sure result. However, that test is the test used daily by judges all over the country to determine custody matters between divorcing parents. Many states, like Texas, use it in a context such as this.* For the reasons explained above,

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* Amici suggest that Petitioner's Statutory Appendix be ignored by this Court. Amici do not interpret many of the statutes listed there in the same way as Petitioner. For example, Petitioner states in his Appendix that "forty-one

(IIC) an unfitness standard would not serve the compelling state interests involved here.

(* con't. page 54) jurisdictions apply the same standard as they do to other parents, where the unwed father demonstrates the degree of interest and support petitioner Kirkpatrick has in this case." (Pet. Br. a-7) This implies that Mr. K. would win legitimation of Baby Girl S. in those 41 jurisdictions, except the six of those using a best interests standard for both parents, leaving 35 jurisdictions. But Petitioner is wrong as to some of those 35 and in others the precise situation is unclear. For example, Petitioner is wrong about Alaska. See Alaska Stat. 25.23.180(c)(2)(1982). The situation in California is unclear, but most likely Mr. K. would not be able to legitimate Baby Girl S there under these circumstances. See W.E.J. v. Superior Court, discussed in Section II B above. The situation in Michigan is also unclear because Ms. S. would have had the right to cut off his rights by serving him with a notice before the birth. MICH. COMP. L. §710.34 (1982-83 Supp.) The recently enacted (eff. June 29, 1982) Ohio law is also unclear. Compare Ohio Rev. Code §2105.18 (best interests test) with §3111.01 et. seq. (best interests test implied but not stated). Amici do not have funds and employees to check every statute in Petitioner's Appendix but with this many errors already noted, Amici suggest that this Court cannot rely on Petitioner's Appendix.

Finally, it should be noted that this is not a case in which the possibility of adoption is at all doubtful and in which failure to legitimate the child would result in the child's being placed in foster care. It is true, as Petitioner alleges, that the trial judge did not have before him the specific adoptive parents, in order to put them on the stand.This would destroy the anonymity of the adoption process. But the judge had testimony from the unwed mother both that she did not think Mr. K. would be as good a parent as she herself (J.A. 186a) and also that her wishes were to place the child for adoption. As not only the child's genetic parent, but also the person who went through the pregnancy and childbirth and was the child's guardian, the mother has a substantive due process right to have her wishes considered.

Additionally, the Christian Homes of

Abilene, Inc., is a licensed child-placement agency, held by the State of Texas to high standards of investigation of prospective adoptive parents. Those parents will not be perfect, but they will be as well-screened as possible in this imperfect world.

V. IF THIS COURT FINDS ANY CONSTITUTIONAL DEFECTS IN THE TEXAS STATUTORY SCHEME CHALLENGED HERE, ITS RULING SHOULD NOT APPLY TO THIS CASE BUT SHOULD APPLY PROSPECTIVELY ONLY AS TO OUT-OF-WEDLOCK CHILDREN CONCEIVED HEREAFTER.

At the time of her sexual relationship, all throughout her pregnancy, and even for a time thereafter, Ms. S. believed that the law guaranteed her the right and the duty of deciding what was in her child's best interest, without a veto from Mr. K. She made many decisions, large and small, in reliance on that belief. The same is true for all other

Texas unwed mothers whose pregnancies are now proceeding or whose children have been born and placed for adoption.

There is no longer an opportunity for them to abort in order to avoid the unwed father's control over their decision-making. For those like Ms. S. whose children have been placed, psychological damage to the children may result from removal from the adoptive home. For others still pregnant, a decision for adoption, which had put their minds at rest about the children's well-being, would be shattered and new decisions would have to be made.

The only way to protect valid expectation interests would be for this Court to apply this rule to conceptions that occur hereafter.

VI. UNLESS THE COURT AFFIRMS THE DECISION OF THE COURT BELOW, REMAND IS NECESSARY TO ALLOW MS. S. A CHANCE TO RECONSIDER HER SURRENDER OF BABY GIRL S. AND TO DETERMINE THE FATE OF THE CHILD.

At the trial of this case, Ms. S. testified that, as between her and Mr. K., she would be the better parent and that if adoption was impossible, she would have to reconsider her surrender of the child and retain custody herself. (J.A. 186a; see also J.A. 377a). She may continue to feel that way and she may not, but she must, if this Court does not affirm the holding below, have an opportunity to choose.

If Ms. S. chooses not to withdraw her surrender of the child, the court on remand will have to consider the question of possible remedies for any consititutional violations this Court may have found. Custody to Mr. K. cannot be automatic, for it might not be in the best interests of the child.

As this Court stated when remanding

Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972), in light of Stanley v. Illinois, supra:

> [T]he judgment vacated and case remanded . . . for further consideration in light of Stanley . . . with due consideration for . . . the fact that the child has apparently lived with the adoptive family for the intervening period of time.

The same would be true here. Thus, Mr. K. could win here and lose below. The court below could find that despite any rights belonging to Mr. K., detriment to the child upon removal would be too severe to tolerate. See Bennett v. Jeffreys. 40 N.Y. 2d 543, 356 NE 2d 277 (1976); J. GOLDSTEIN, A. FREUD, A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979).

No decision of this Court should permit harm to Baby Girl S., an innocent child in the midst of legal turmoil.

CONCLUSION

We ask this Court to listen carefully to the voices of the young unwed mothers whose interests have not heretofor been represented here and to affirm the decisions of the courts below.

P.K. writes:

> Please before a decision is made put yourself in our place. Also, if you have [a] daughter or younger sister what place would this put her in? Thank you and think hard about this before deciding.

On a more philosophical level, SS. writes:

> We are a very strange society. In our very efforts to promote "freedom" and "openness" and "equality" we may find ourselves harming the very structures and institutions, in this case family and adoption, which we seek to protect and strengthen.

Respectfully submitted,

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No. 82-647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DONALD J. KIRKPATRICK,
Petitioner

v.

CHRISTIAN HOMES OF ABILENE, INC., and the 326th DISTRICT COURT OF TAYLOR COUNTY, TEXAS,
Respondents

ON WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

BRIEF FOR THE NATIONAL COMMITTEE FOR ADOPTION, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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ENTRY OF APPEARANCE

The undersigned hereby enters his appearance as counsel of record for The National Committee for Adoption, Inc., Amicus Curiae.

Dated this 22nd day of March, 1983.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The National Committee for Adoption, Inc. ("NCFA") is a national, voluntary, non-profit charitable corporation organized to promote sound adoption policies and practices. NCFA is comprised of individual members and private not-for-profit licensed adoption agencies providing services in 39 states and the District of Columbia. Individual members include adoptive parents, adopted men and women, biological parents of adopted children, and interested professionals. NCFA sponsors conferences on adoption issues and follows the development of state and federal laws affecting adoption. NCFA is especially concerned about legal developments—legislative and judicial—that affect the timing and security of infant adoptive placements.

NCFA has a special interest in the issues presented in this case. Depending on how broadly those issues are resolved, the decision may seriously affect the ability of NCFA members to assist unwed teenage mothers attempting to extricate themselves from the adverse consequences of imprudent sexual behavior.

NCFA is particularly concerned because neither the mother involved in this litigation nor the child have to date participated through legal counsel in appellate proceedings, including proceedings before this Court.

NCFA member agencies have had extensive experience working with unwed parents, male and female. NCFA agencies are aware that the rules defining the procedural and substantive rights of unwed parents will have tremendous significance in determining whether biological parents will consider adoption as an option to abortion or to raising unplanned children. NCFA believes that its insights, gained through the collective experience of its members, will be helpful to the Court in its effort to balance and protect the respective rights of out-of-wedlock children and their biological parents.

Counsel of record for all parties have given written consent to the filing of this Amicus Curiae Brief in support of Respondents (pp. A-1-A-3, *infra*).

PARTIES

Petitioner: Donald J. Kirkpatrick, biological father of the child Baby Girl S., a child born out-of-wedlock.

Respondents: Christian Homes of Abilene, Inc., the agency to whom the child's mother relinquished her parental rights as a prerequisite to adoptive placement, and the 326th District Court of Taylor County, Texas, the trial court which rendered the judgment attacked in this proceeding.

Other persons interested and parties in the trial court and apparently unrepresented before the Court in these proceedings either by attorney of their choice or by appointed counsel: R.L.S., the child's mother, who has requested to remain anonymous, and Baby Girl S., the child.

STATEMENT OF THE CASE

About April, 1980, Petitioner Don Kirkpatrick, then age 23, impregnated R.L.S., then age 15, in Nebraska.[1] His relationship with R.L.S. began while R.L.S. was a 14-year-old eighth grader (J.A. at 172a) and he was 22. By having sexual relations with R.L.S., Kirkpatrick committed the felony of sexual assault in the first degree.[2]

R.L.S. worried about getting pregnant but was unwilling to discontinue sexual relations with Kirkpatrick (J.A.

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[1] Baby Girl S. was born on January 11, 1981 (J.A. at 27a). Conception occurred about April, 1980. Kirkpatrick was born April 8, 1956 (J.A. at 389a). R.L.S. was born October 1, 1964 (J.A. at 118a).

[2] From the record, it cannot be determined whether R.L.S. was 14 or 15 years of age when intercourse began. NEB. REV. STAT. §28-319 (1979) states that any person subjecting another person to sexual penetration is guilty of sexual assault in the first degree if the actor is nineteen years of age or older and the victim is less than sixteen years of age. Consent by the victim is no defense.

at 120a). After learning of the pregnancy, Kirkpatrick offered marriage (J.A. at 157a). R.L.S. refused, established residence at Christian Homes of Abilene (the "agency") and made plans to release the child for adoption. Kirkpatrick and R.L.S. never lived together, never married, never attempted to marry, and never established a family relationship, formal or informal.

Throughout the pregnancy, Kirkpatrick expressed a desire to marry R.L.S. and raise the child (J.A. at 137a). He agreed, however, not to block adoption of the child if R.L.S. chose that option (J.A. at 289a, 324-325a). After the child's birth on January 11, 1981, in Abilene, Texas, Kirkpatrick told agency representative Nancy Miller that he would sign papers releasing his rights with respect to the child and requested that she send the papers to him (J.A. at 27a, 206a, 344a). On January 15, 1981, the agency filed this suit (J.A. at 1a, 5a-11a). Believing that Kirkpatrick would keep his word, R.L.S. relinquished her parental rights the following day (J.A. at 12a-17a, 163a-165a). Kirkpatrick was given notice and, on January 29, he signed a statement of paternity (J.A. at 27a-29a). On February 3, he counterclaimed to establish the parent-child relationship by voluntary legitimation (J.A. at 1a, 38a) pursuant to TEX. FAM. CODE ANN. §13.21 (Supp. 1982-83).

Voluntary legitimation in Texas is automatic if the biological parents marry or attempt to marry, either ceremonially or informally, after conception.[3] Texas courts must legitimate a child if the biological parents with or without marrying jointly seek legitimation.[4] If the mother seeks child support from the biological father, she implicitly consents to legitimation by requesting establishment of the parent-child relationship by proof of pater-

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[3] TEX. FAM. CODE ANN. §12.02 (Supp. 1982-83).

[4] TEX. FAM. CODE ANN. §13.21(b) (Supp. 1982-83).

nity.[5] Texas courts may not override parental legitimation decisions unless one or both biological parents invoke

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[5] TEX. FAM. CODE ANN. §§13.01-13.09 (Supp. 1982-83). The paternity and voluntary legitimation provisions are part of the same Family Code chapter, Chapter 13. Nothing stops an alleged or putative father from seeking to establish paternity under the provisions of §§13.01-13.09. The express language of §13.02(b) includes the "alleged father" as a possible paternity suit petitioner. Therefore, there is a Texas statutory construction issue which was not raised and has not been ruled on in the courts below, that issue being: "Can a biological father circumvent the provisions and policy of §13.21(b) by pleading that he is the father, insisting upon blood tests, and proving that he is the father by scientific means rather than by the mother's admission?" An affirmative answer would, in the opinion of your Amicus Curiae, be absurd, and would mean that §13.21(b) is mere surplusage applicable only to a bizarre class of biological fathers defined only by their attorneys' lack of ability to read and understand the law. As a practical matter, *any suit to establish the parent-child relationship brought by a man claiming to be the biological father is a voluntary legitimation suit.* If the issue of paternity is disputed, as in a case in which the mother in bad faith disputes the father's parentage, it may also be a paternity suit. The specific provisions of §13.21(b) are compatible with and control the general provisions of §§13.01-13.09. "It must not be presumed, when construing a statute, that the Legislature intended to provide for an absurdity. . . ." *Hunter v. Whiteaker & Washington*, 230 S.W. 1096, 1097 (Tex. Civ. App.—San Antonio 1921, writ ref'd). All parts of a statute should be given effect. Courts, in construing statutes, should follow the presumption that every word in a statute is used for a specific purpose, not as mere drafting surplusage. *Jessen Associates, Inc. v. Bullock*, 531 S.W. 2d 593, 600 (Tex. 1975)

Your Amicus Curiae does not believe that there is any merit to the argument that Texas law establishes equality between unwed fathers and other parents in those cases in which the father files a "paternity" suit but not in those cases in which he labels his cause of action "voluntary legitimation." The idea is absurd. Your Amicus Curiae understands that the Texas Attorney General has filed a brief in this Court suggesting that the writ has been improvidently

the court's jurisdiction to resolve a dispute between themselves.

The child's mother and managing conservator refused to consent to legitimation (J.A. at 45a-52a). Alleging legitimation to be in the child's best interest, Kirkpatrick asked the trial court to give consent as provided for Family Code §13.21. In the trial court, Kirkpatrick never suggested that the statute under which he sought relief might be unconstitutional on its face or unconstitutionally applied to him.[6]

A final hearing on the merits was held on August 28, 1981 (J.A. at 96a-399a). The parties waived their right to a jury trial and submitted all fact and law issues to the trial judge. The judge found that although Kirkpatrick would be fit to raise a child at some point in his life, he was not a proper person to raise the child involved in this suit.[7] Ac-

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granted on the grounds that Kirkpatrick failed to avail himself of the appropriate remedy, legitimation through proof of paternity. Your Amicus Curiae, while being of the opinion that the writ may have been improvidently granted for other reasons, believes that the Attorney General's argument is nothing more than an attempt to shield the Texas voluntary legitimation statute from constitutional scrutiny by this Court and should be rejected. The statute stands on its own merits. Rejection of the idea that under Texas law a biological father can circumvent the requirements of §13.21(b) is implicit in the Texas Supreme Court's writ refusal in this case and in its opinion in *In the Interest of T.E.T.*, 603 S.W. 2d 793 (Tex. 1980), *cert. den. sub nom. Oldag v. Catholic Charities*, 450 U.S. 1025 (1980).

[6] Kirkpatrick did not ask the trial court to declare any Texas statute unconstitutional. He could have challenged the constitutionality of the statute pursuant to TEX. REV. CIV. STAT. ANN. art. 2524-1 (1965).

[7] The trial judge, in announcing his decision, stated: "The Court finds that this young man here would, in fact, be a proper person to have parental rights under perhaps other circumstances, if it was other circumstances. Those circumstances do not now exist." (J.A. at 379a).

cordingly, the trial judge denied Kirkpatrick's legitimation request and terminated the parent-child relationship between the child's mother and the child (J.A. at 70a-78a).

On appeal, Kirkpatrick for the first time alleged that Family Code §13.21 violated the due process and equal protection guarantees of U.S. CONST. amend. XIV, §1. The Court of Civil Appeals affirmed (J.A. at 400a-414a). The Texas Supreme Court, finding no reversible error, refused further review (J.A. at 415a). On January 17, 1983, this Court granted Kirkpatrick's petition for a writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

The "Questions Presented for Review" by Petitioner Kirkpatrick (Brief for the Petitioner, pp. i-ii), while sufficiently clear to give notice that Petitioner is attacking the Texas voluntary legitimation statute on Fourteenth Amendment Due Process and Equal Protection grounds, should be narrowed and rephrased in order to conform with the facts and with the judgments and decisions of the courts below. There is no state court judgment terminating the parent-child relationship between Kirkpatrick and the out-of-wedlock child who is the subject of this litigation. There is only a judgment denying that such a relationship exists and terminating "all rights in and to Baby Girl S. which Donald J. Kirkpatrick may have. . . ." Therefore, your Amicus Curiae offers the following restatement of the Questions Presented for Review:

1. May Texas, without demonstrating parental unfitness, and pursuant to the "best interests of the child" standard, refuse to grant the biological father of an out-of-wedlock child full parental rights and terminate those rights in and to such child which the biological father may have solely by virtue of his biological parentage in those cases in which (a) the child's mother refuses to consent to the father's acquisition of parental rights and (b) the child's mother and father have never cohabited as a family?

2.a. May Texas apply an unfitness standard in proceedings to terminate the parent-child relationship between out-of-wedlock children and in-wedlock fathers, in-wedlock mothers, and out-of-wedlock mothers, but apply a "best interests of the child" standard in proceedings to terminate those rights in and to an out-of-wedlock child which the out-of-wedlock father of such child may have solely by virtue of his biological parentage?

b. Does such differentiation represent unconstitutional discrimination on the basis of illegitimacy and gender?

3. May Texas in contested legitimation cases require an out-of-wedlock father to satisfy a burden of proving that the child's best interests would be served before recognizing him as a legal as well as a biological father?

SUMMARY OF ARGUMENT

Don Kirkpatrick, at age 23, had no business having sexual relations with an immature 15-year-old schoolgirl. The right to procreate does not include the right to commit felony sexual assault or to impregnate unwed teenagers. Kirkpatrick's sperm impregnated an egg in R.L.S.'s body. He has no other relationship with Baby Girl S. On that basis alone he claims the status and rights of a legal parent that he would have obtained by establishing a family through marriage. Parental rights, however, do not automatically flow from biological parentage. *Quilloin v. Walcott*, 434 U.S. 246 (1978).

Kirkpatrick has had notice, an opportunity to be heard, and an opportunity to have his case reviewed by appellate tribunals. He has had the procedural due process mandated by *Stanley v. Illinois*, 405 U.S. 645 (1972).

Kirkpatrick's equal protection arguments ignore the realities of out-of-wedlock conception, pregnancy, and birth. Men and women are not similarly situated with respect to the problems and risks of sexual intercourse.[8]

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[8] *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 471 (1981).

Unintentional out-of-wedlock pregnancy has become a major social problem. The State has a substantial and compelling interest in preventing such pregnancies and in protecting the physical and mental health of unwed mothers and their children. The State has a substantial and compelling interest in protecting the unwed mother's right to make her decision whether to abort or give birth without fear that her plans for the child may be vetoed by the father without regard to the child's best interest. The State has a substantial and compelling interest in allowing the unwed mother to decide to retain or release parental rights with assurance that if she chooses adoption, her plans may not be vetoed arbitrarily by the child's biological father if adoption is the best alternative for the child.

What at first appears to be gender-based inequality in Texas legitimation law is really the State's method of balancing three different interests: that of the child, of the mother who has rejected abortion and chosen life for the child, and of the father, who is given a chance to establish parental rights out-of-wedlock under appropriate circumstances. Under Texas law, the child's mother cannot arbitrarily prevent any biological father from acquiring full parental rights. When the mother seeks to place a child for adoption and the father seeks legitimation, neither party can prevail over the other without proof of the child's best interest. The "best interest" test as applied in this case and others like it is neutral and favors neither men nor women.

Gender-based distinctions which serve important governmental objectives and are substantially related to achievement of those objectives are not proscribed by the Equal Protection Clause. *Caban v. Mohammed*, 441 U.S. 380, 388 (1979). Conditioning legitimation on proof of best interest in contested cases prevents men who impregnate women to whom they are not married from acquiring parental rights inconsistent with the child's best interest, promotes the physical and mental health of unmarried pregnant women, and allows unwed mothers to make decisions concerning abortion and adoption without being "coerced by circumstances" into unwanted abortions or

into keeping children they are ill-equipped and would be otherwise unwilling to raise. The minor inequality between the substantive rights of mothers and fathers of out-of-wedlock children is well-justified in light of the important state interests protected.

ARGUMENT

I.

THE TRIAL COURT'S REFUSAL TO GRANT PETITIONER KIRKPATRICK'S COUNTERCLAIM FOR VOLUNTARY LEGITIMATION DID NOT DEPRIVE PETITIONER OF SUBSTANTIVE OR PROCEDURAL DUE PROCESS OF LAW

A. Introductory Statement

Petitioner Kirkpatrick should never had sexual relations with 15-year old R.L.S. He was, in his own words, "older and should have known better" (J.A. at 394a).[9] Unfortunately, there are many men and boys like Petitioner who impregnate teenage girls.[10]

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[9] The acts of intercourse occurred in Nebraska and violated NEB. REV. STAT. §28-319 (1979). At trial, no party offered into evidence the Nebraska sexual assault statute. Therefore, the trial judge was entitled to assume that Nebraska law was equivalent to Texas law. *Braddock v. Taylor*, 592 S.W.2d 40 (Tex.Civ.App.—Beaumont 1979, writ ref'd n.r.e.). Under Texas law, Kirkpatrick's actions would have been punishable as "rape of a child," a felony of the second degree. TEX. PEN. CODE ANN. §21.09 (Supp. 1982-83).

[10] The State may constitutionally set age requirements for marriage. "Surely, for example, a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, and that no one can marry who has a living husband or wife." *Zablocki v.*

The rise in teenage pregnacy presents Texas and other states with enormous social problems. A recent study estimates that in 1980 alone 998 babies were born to Texas mothers 14 years of age or younger.[11] That study also estimates that:

1. Of the over 2,000,000 Texas teenagers between the ages of 15 and 19, one-half of the boys and one-third of the girls are sexually active;
2. Only 49% of teens use contraception at first intercourse, withdrawal being the most common method used;
3. Approximately 92,295 Texas girls between the ages of 15 and 19 became pregnant in 1980;
4. Half of those girls became pregnant out-of-wedlock;
5. Of the 92,295 pregnancies, 49,093 resulted in live births, 27,247 were terminated by voluntary abortion, and the remainder ended by miscarriage;
6. Maternal death is 60% higher for these teens than for mothers between the ages of 20 and 24;
7. The risks of congenital malformation, low birth weight, birth injury and infant death are greater for babies born to teenagers than for other babies;
8. The suicide rate among pregnant teenage mothers is seven times greater than among their non-pregnant peers;
9. Teenage mothers are more likely than other parents to abuse and neglect their children;
10. 95% of unmarried teen mothers keep their babies; and

Redhail, 434 U.S. 374, 392 (1978) (Stewart, J., concurring). The State may also send men to jail for having intercourse with underage girls to whom they are not married. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981). These laws may deter, but obviously do not stop, teenage sexual activity.

[11] Texas House of Representatives, *Final Report of the Select Committee on Teenage Pregnancy* (October 1, 1982), p. 5.

11. Eight out of ten teenage mothers never finish high school.[12]

Kirkpatrick knew that unintentional pregnancy might result from his illegal actions. As a result of his own irresponsibility, he was forced to ask the State's permission to acquire parental rights, that permission having been refused by the child's mother. His only complaint in this Court is that Texas courts refuse to grant him affirmative relief found to be contrary to the child's best interest.

By voluntarily engaging in sexual relationships with unmarried teenage girls, men such as Don Kirkpatrick implicitly consent to application of reasonable state regulations designed to protect unwed mothers and their children. If Kirkpatrick did not like the rules through which responsibility for out-of-wedlock children is determined, he should have abstained from out-of-wedlock intercourse or utilized better contraceptive methods. He may not secure parental rights simply by admitting his past indiscretions and apologizing for the continuing harm being done to the child's mother. The State may

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[12] Texas House of Representatives, *Final Report of the Select Committee on Teenage Pregnancy* (October 1, 1982), pp. 5-6. Why do teen girls such as R.L.S. engage in intercourse in the first place? For some teen mothers, the answer is simple. It is difficult for an immature girl to say "No" to a boyfriend about whom she really cares. In this case, there is no question but that Kirkpatrick and R.L.S. were strongly attracted to one another. Other reasons suggested by Planned Parenthood as reasons for teen intercourse include: (a) trying to cure loneliness or unhappiness; (b) hoping to become popular; (c) using physical sex to avoid having a close, caring relationship; (d) worrying that it is the only way not to appear homosexual; (e) wanting to discover the "fireworks" that always go with sex on TV, records, movies, magazines, and books; (f) believing that "the first time" is not important so just get it over with; and (g) proving their independence, especially to parents they're angry with. Planned Parenthood Federation of America, Inc., "TEENSEX? It's okay to say NO WAY" (Planned Parenthood Federation of America, Inc., Pamphlet No. 1592, 1981).

constitutionally require a finer balancing of the respective rights of father, mother, and child. Kirkpatrick has been denied neither procedural nor substantive due process by the subordination of his rights to the welfare of the child conceived as a result of his illegal behavior.

B. **Kirkpatrick Has Not Been Denied Procedural Due Process.**

Kirkpatrick has had notice, access to all discovery methods available under Texas law, an opportunity to be heard in person and by attorney, an opportunity (unexercised) for a jury trial, an opportunity to present evidence, an opportunity to confront opposing parties and adverse witnesses, an opportunity (unexercised) to challenge the constitutionality at trial of the rules determining the outcome of his case, and an opportunity to have his case reviewed for error by appellate tribunals. He has had all procedural protections available to civil litigants in Texas and all procedural protections mandated by the Fourteenth Amendment.

Kirkpatrick contends, however, that the "best interest of the child" test is unconstitutionally vague and overbroad, that it fails to give him notice as to which behavior is permitted and which prohibited, that it is susceptible to subjective, arbitrary, and capricious application by different factfinders, and that it delegates to judges and juries basic policy decisions which should be determined by legislatures rather than by courts. Judges and juries, according to Kirkpatrick, cannot be trusted to make best interest determinations. Under Kirkpatrick's theory, they would be reduced to considering "objective" facts such as the fact of biological paternity.

Kirkpatrick apparently is unaware that the "best interest" standard has acquired an established core of meaning under Texas law. In *Holley v. Adams*, 544 S.W. 2d 367, 372 (Tex. 1976), the Texas Supreme Court identified factors to be considered by trial and appellate courts in making and reviewing best interest determinations:

> "(A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C)

the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interest of the child; (F) the plans for the child by these individuals or by the agency seeking custody; (G) the stability of the home or proposed placement; (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent."

Kirkpatrick asserts that the record in this case illustrates how easily the best interest test may be misapplied. This is an attempt to secure reversal of the courts below on evidentiary grounds. Kirkpatrick fails to mention that there was significant unrebutted testimony about the danger of emotional injury to the child resulting from the antagonism between the child's biological parents and their families.[13]

Kirkpatrick suggests that best interest considerations standing alone are insufficient grounds for denying him parental rights. In his case, however, as in contested legitimation cases generally, *other facts were proven*

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[13] Kirkpatrick did not oppose termination of the parent-child relationship between R.L.S. and the child and testified that if the court gave him parental authority over the child, he would never go around the child's mother or try to contact her or her family (J.A. at 207a-208a). He would, however, tell the child the name of her mother (J.A. at 208a). He did not explain how he would explain the mother's absence to the child.

Nancy Miller, the only witness called to testify as an expert, expressed concern that Kirkpatrick's parents would reveal to the child their feeling that the child's mother had "given the child away" because she did not love or care for the child. Communicating that message to the child would be damaging to the child (J.A. at 358a-359a). Kirkpatrick's father had earlier testified that a person considering "giving away a child" was not showing concern about the child's best interests (J.A. at 274a).

before the best interest test could be applied: (1) that he impregnated a woman; (2) that he was not married and had never established a family relationship with that woman or the child; and (3) that neither the child's mother nor managing conservator consented to legitimation. The best interest test does not stand alone. It is not and was not in Kirkpatrick's case applied in a vacuum.

Although Texas no longer condemns fornication between consenting adults as a crime, the Texas legitimation laws make clear that any man who impregnates a woman to whom he is not married must, in order to secure parental rights with respect to an out-of-wedlock child, be prepared to demonstrate in court either that the mother consents to legitimation, that he has established a family relationship with the child's mother or the child, or that legitimation is in the child's best interest. The Texas legitimation laws are not unconstitutionally vague.

This is not a case (such as *Stanley* or *Caban*) in which evidence has been presented proving that the biological father has lived with, raised, and supported the child or, with consent of the child's mother, regularly visited and established a personal relationship with the child. In this case, Kirkpatrick illegally and accidentally impregnated a teenage mother, never established a family relationship with her or with the child, and failed to secure consent to legitimation from the child's mother or managing conservator.

Kirkpatrick, however, claims that he is unable to determine from Texas statutes what behavior Texas finds objectionable (Petitioner's Brief, pp. 40-41). He need look no further than TEX. PEN. CODE ANN. §21.09 (Supp. 1982-83), the Texas statutory rape ("rape of a child") law. Kirkpatrick is charged with knowledge of the laws forbidding sexual relations with unmarried minors. He knew it was wrong to have intercourse with a 15-year old girl and should have known that having intercourse with R.L.S. violated NEB. REV. STAT. §28-319 (1979). Kirkpatrick, whose behavior was well beyond the boundaries of acceptability in his home state and in the State of Texas, is the wrong petitioner to complain about being unable to deter-

mine what behavior is and is not acceptable.

Judges and juries are not incompetent to make best interest determinations. Best interest determinations are made as a matter of course in custody proceedings. Judges are well able to adjudicate best interest issues in termination and voluntary legitimation situations. Appellate courts are able to remedy abuses of discretion in the making of best interest determinations.[14] If judges, juries, and appellate courts cannot make and review best interest decisions, the main body of American custody law will have to be replaced.

The Texas Legislature has instructed the courts to apply the "best interest" test in legitimation suits only if the child was conceived and born out-of-wedlock and the mother and managing conservator refuse to consent to legitimation. The Legislature need not define "best interest" nor define the relative weights to be given the "best interest" factors in individual cases. The Legislature cannot make decisions concerning the welfare of each child born out-of-wedlock to biological parents who disagree on legitimation. There is nothing impermissible about delegating to courts power to make case-by-case child welfare decisions on "best interest" grounds rather than on more specific, "objective" grounds which do not take into consideration the totality of a child's needs.

C. Kirkpatrick Has Not Been Denied Substantive Due Process.

Biological fathers of out-of-wedlock children have substantive due process rights. The question is: "What are those rights and how should they be balanced with the

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[14] See, *e.g.*, *Ervin v. Wichita County Family Court Services*, 533 S.W. 2d 947 (Tex. Civ. App.—Fort Worth 1976, no writ) (judge abused discretion in finding that termination would be in children's best interest based on evidence that mother left her children with a cousin for several days, that she did not return on schedule, that she returned accompanied by a "colored" family, and that the children had suffered colds but were otherwise healthy).

rights of the mother and with the rights of the child?"[15]

Kirkpatrick and the child's mother never married or lived together. After the child's birth, Kirkpatrick and R.L.S. made no agreement concerning the child. Kirkpatrick did, however, promise to acquiesce in the mother's plans for adoption (J.A. at 206a, 344a). Kirkpatrick has never seen the child. The State is not forcing the breakup of a family unit or breaking up a relationship between Kirkpatrick and the child.

This case cannot be analogized to abuse or neglect proceedings in which a state, on its own initiative, seeks to remove a child from an existing family unit, formal or informal. The State is not intruding into the privacy of family affairs. Kirkpatrick is asking the State to give him

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[15] Kirkpatrick ignores the balancing of rights issue. As 1984 approaches, it is, perhaps, appropriate that Kirkpatrick engages in Orwellian Newspeak to the effect that "The best interest of a child is contrary to the best interest of the child" and that "The best way to protect pregnant women is to take away from them the opportunity to make decisions concerning the welfare of their children."

Instead of dealing with the realities of *the mother he impregnated*, Kirkpatrick speaks only in general terms about the right of women to be free of the stereotypic child-caring role:

> "Less obvious but equally invidious is the harm done to women generally by perpetuation of such stereotypes. As a result, women are locked into the child-caring role and unable to share child-caring responsibilities equally with men. Great harm, both psychological and social, is done to women and men who do not fit the stereotyped mold. Women are unfairly condemned by society when they lose or relinquish custody of their children, and men disparaged when they assume primary caretaking and nurturing roles."

(Petitioner's Brief, pp. 70-71). None of this discussion suggests that it would be better for R.L.S. (or better for the child) that R.L.S. turn the child over to Kirkpatrick and his family, who have already condemned her at trial for her desire to relinquish child-caring responsibility for this child. The end result is to ignore the mother's and child's rights entirely.

parental rights over the objection of the teenage girl he illegally and irresponsibly impregnated.

Parental rights do not automatically flow from biological parentage. In *Quilloin v. Walcott*, 434 U.S. 246 (1978), paternity was undisputed. Quilloin, the father of an out-of-wedlock child, contended that he could not be denied veto power over a proposed adoption absent a showing of his parental unfitness. His legitimation request was refused solely on "best interest" grounds. Speaking through Justice Marshall, the Court *unanimously* held that ". . . under the circumstances of this case appellant's substantive rights were not violated by application of a 'best interests of the child' standard." *Id.*, 434 U.S. at 254.[16] The "best interest" test may be constitutionally applied and is not constitutionally infirm on its face as violative of substantive due process.

Texas must have a mechanism for determining whether or not the father of an out-of-wedlock child will be recognized as a legal parent. The husband-father automatically qualifies as a legal parent; the forcible rapist rarely will.[17] The standard employed to determine

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[16] The statute involved in *Quilloin* and the statute involved in this case may be constitutionally applied and are not facially unconstitutional. It does not help Kirkpatrick to argue that the statute, as applied to others differently situated, might be unconstitutionally applied. ". . . [A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).

[17] The husband-father qualifies automatically through marriage, the primary social institution through which the privacy and autonomy of family life are shielded from state intervention and pursuant to which husband and wife *agree* to share joint responsibility for the children conceived and born to the mother during marriage. The forcible rapist will qualify as a parent only if the mother files and wins a paternity suit for the purpose of collecting support from him.

which fathers will and will not be allowed to exercise parental rights should not give the child's mother an opportunity to prevent arbitrarily the father's acquisition of parental rights, should be flexible enough to allow appropriate decisions under a wide variety of circumstances, and should be fair to the child as well as to the child's parents. The best interest test may not be perfect but it is the most appropriate test available when the State is asked to create a "family" relationship between nonconsenting parties rather than to break up an existing family relationship. The best interest test can be sensibly applied to a wide variety of situations, is sexually neutral, and does not favor fathers over mothers or mothers over fathers. The best interest test favors the child over both parents so that legitimation cannot be blocked by the mother or forced over her objection except to protect the child's best interest. No fairer balance is possible. The best interest test, limited as it is under Texas law to application only under special fact situations (such as out-of-wedlock childbirth resulting from sexual relations between parents not cohabiting as a family unit) meets the requirements of substantive due process.

II.

THE TRIAL COURT'S REFUSAL TO GRANT PETITIONER KIRKPATRICK'S COUNTERCLAIM FOR VOLUNTARY LEGITIMATION DID NOT DEPRIVE PETITIONER OF EQUAL PROTECTION UNDER THE LAW

Kirkpatrick contends that he, as a male biological parent, must be given substantive rights identical to those of a female biological parent. He implies that establishing a mechanistic and undiscriminating equality between men and women is more important than protecting the welfare of children. He asserts that substantive grounds for terminating "parent-child relationships"

must be universally applicable to all biological parents, male and female, married or unmarried. Carried to its extremes, Kirkpatrick's theory is that the parental rights of rapist and victim are equal, that the parental rights of sperm donor and donee are equal, and that the parental rights of an adulterous wife and her lover are equal and superior to those of the wife's husband. These results are compelled by simplistically equating parental rights with proof of biological parentage.

Presumably, Kirkpatrick would apply this rule of absolute equality over the full range of accidental pregnancy situations: (1) incest; (2) forcible rape; (3) casual intercourse under the influence of alcohol or drugs; (4) prostitution; (5) promiscuity; (6) contraceptive breakdown; (7) mistake or deception by either parent concerning reproductive capacity; (8) mistake or deception concerning the adequacy of contraceptive methods used; (9) immature adolescents' first episodes of sexual intercourse; (10) casual sex between people having no desire for a permanent relationship with one another; (11) premarital sex between teenagers who, in the heat of the moment, think that they are "in love" with one another; (12) extramarital sex between a woman and a man other than her husband; and (13) extramarital sex between a man and a woman not his wife. Kirkpatrick would apparently apply the test of equality in these situations as well as in cases such as *Caban* and *Stanley* which involved long-standing relationships between father, mother, and child.

Kirkpatrick would have no gender-based complaint if legitimation were conditioned on paternity alone and the parental rights termination statute amended to include new sections disposing of fathers (and mothers) who should not have parental rights. To eliminate gender-based distinctions, Kirkpatrick would have the Texas Legislature amend TEX. FAM. CODE ANN. §15.02 to read as follows:

> "A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:

"(1) the parent has:

"...

"(L) raped the other parent, thereby resulting in conception of the child;

"(M) engaged in sexual relations with a person to whom such parent is not married, thereby resulting in accidental conception of the child; or

"(N) voluntarily engaged in an incestuous relationship with the other parent, thereby resulting in conception of the child; and

"(2) termination is in the best interest of the child."

That solution, while establishing equality between the sexes, would also authorize extensive state intervention in the lives and personal affairs of unmarried persons, including unmarried parents who might agree to voluntary legitimation of their out-of-wedlock children. In contrast, the existing gender-based legitimation statute minimizes state interference with mother-child relationships and authorizes state interference with father-child relationships only when disputes concerning legitimation arise between unmarried biological parents.

It is far more important to have legislation which minimizes state interference with consensual family relationships than it is to have legislation that rigidly and irrationally ignores legitimate gender-based distinctions. Although the Texas voluntary legitimation statute does not establish perfect equality between the sexes, the degree of inequality is minimal and justified by compelling state interests.

"The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). Gender-based distinctions which serve important governmental objectives and are substantially related to achievement of those objectives are not proscribed by the Equal Protection Clause. *Caban v. Mohammed*, 441 U.S. 380, 388 (1979).

Men and women are not similarly situated with respect to the problems and risks of sexual intercourse (in-

cluding unintentional conception and the consequences thereof).[18] Men do not suffer the pains and burdens of pregnancy, nor must they make the decision whether or not their out-of-wedlock children will be born or aborted.[19]

Whatever his *moral* obligations may be, the biological father of an out-of-wedlock child is not legally responsible for the child until the child has been born and legitimated. He may delay decision-making until after the child's birth.[20] The mother cannot.[21]

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[18] "We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 471 (1981). Those consequences do not end immediately upon birth of the child as Petitioner suggests.

[19] In making her decision to abort or give birth, the mother may consider many factors. "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved." *Roe v. Wade*, 410 U.S. 113, 153 (1973).

[20] Reprehensible though it may seem, the father may wait until the baby's sex and health are known. Some fathers file legitimation suits as a gambit to force the mother to drop statutory rape charges. Still others file legitimation suits in an effort to coerce the mother into marriage. In this case, R.L.S. testified that ". . . I feel like by getting the child maybe he thought he would get me." (J.A. 153a). Kirkpatrick denied using the suit as a means of persuading R.L.S. to marry him (J.A. at 201a). Nancy Miller, however, testified that on the day before R.L.S. signed her relinquishment affidavit,

The constitutionally protected right of the mother to decide whether to abort or give birth, *Roe v. Wade*, 410 U.S. 113 (1973), is so important that not even a pregnant

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Kirkpatrick asked her if R.L.S. might come back to him if he refused to sign the papers and tried to get the baby (J.A. 343a).

Some biological fathers postpone decision-making because of the unpleasantness of the task. In this case, Kirkpatrick could not possibly satisfy the desires of R.L.S. and her family and the desires of his own parents, upon whom he appeared at trial to be financially dependent. He wavered back and forth between alternative courses of action. At trial, R.L.S.'s mother commented about Kirkpatrick's indecisive behavior (J.A. at 288a). Agency representative Nancy Miller observed that same indecisiveness (J.A. at 342a-344a).

Some possible biological fathers desire to wait until they can verify their paternity. In some cases, they have no way of being sure that they are fathers at all. It is not unusual for an alleged father to take the attitude before birth that he will be responsible for the child *if* he is the child's father but not otherwise. This is a serious problem for an unwed mother who has had sexual relations with more than one man during the period of possible conception.

If two or more men are possible fathers, must each be given a chance to determine through blood testing and other methods which is the real father before being called upon to seek voluntary legitimation? Can the State require the alleged biological father to make a commitment *before birth* even though proof of parentage cannot be established until after birth?

Legislators desiring to cope with the problems of unwed teenage mothers are hesitant to deal with the real differences between mothers and fathers for fear of violating the Equal Protection Clause. That fear impedes meaningful legislative action even in situations in which gender-based differentiations are absolutely essential.

[31] "While the mother who is unmarried and pregnant is trying to figure out what she will do with the child, the father is totally free from any responsibility with respect to the child. To classify him as a parent simply because he is the biological

woman's husband or parents, if she is competent, may veto her decision. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 662 (1979). The State has an interest in giving the child's mother an appropriate climate in which to make that decision. The mother is entitled to know the consequences of her decision. If she gives birth to the child, will she be allowed to raise the child without interference from the father? Will the father be allowed to legitimate the child over her objection? Will the father be awarded custody and the right to collect child support from her? Will she be able to place the child for adoption? Will she be able to make decisions which protect the child's welfare, or will her decisions be thwarted by the biological father even if she makes the decision that is best under the circumstances? Wrong answers to these questions may lead unmarried mothers to abortion when they would prefer to give birth and place the children for adoption. The State has a legitimate interest in permitting the competent mother to make the decision she thinks right for herself and the child and to make that decision without fear that it may be overridden by the biological father absent proof of best interest.

After birth, the child's mother must make arrangements for the child's care. She must decide whether to raise the child herself or to release the child for adoption. She must make these decisions in a climate of uncertainty. Under existing Texas law, if she gives birth to the child, she cannot be sure that the child will grow up in an environment that she considers suitable. If she decides to retain her parental rights, she cannot even be sure that

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father would give him a powerful club with which he could substantially reduce the options available to the unmarried mother. All must agree that an unmarried fourteen-year-old high school freshman has a serious problem when she discovers that she is pregnant and she needs all the options that the State can properly make available to her." *In the Interest of T.E.T.*, 603 S.W. 2d 793, 797 (Tex. 1980), *cert. den. sub nom. Oldag v. Catholic Charities*, 450 U.S. 1025 (1980).

she will be awarded custody of the child. The "best interest" test which allegedly discriminates against men also permits juries to award custody of children to their fathers. TEX. FAM. CODE ANN. §14.01 (1974) prohibits juries in custody cases from making decisions based upon the sex of a parent. The pregnant mother of a child to be born out-of-wedlock must live with the possibility that the biological father may seek and obtain legal custody and child support as well. If she has any legal awareness, she will know that by counseling with an adoption agency, she may prejudice her rights in any custody dispute she might later have with the father. Many jurors and judges share the anti-adoption bias displayed by Don Kirkpatrick's father during the trial (J.A. at 274a). For many people, a person who considers "giving a baby away" is totally unfit to be a parent. These are the realities with which an unwed mother must deal.

Texas statutes, unlike the statutes involved in *Caban v. Mohammed, supra*, do not enable the child's mother to cut off arbitrarily any biological father, not even a convicted rapist. The mother must identify the biological father in a sworn affidavit. TEX. FAM. CODE ANN. §15.04 (Supp. 1982-83). The father, if identifiable, must be given legal notice of any suit in which the mother's rights may be terminated. TEX. FAM. CODE ANN. §11.09(a)(8) (Supp. 1982-83). In that suit, he may counterclaim for voluntary legitimation. His opportunity to convince the judge and jury what is best for the child is no different from that of the mother. He may force voluntary legitimation over the mother's objection, block her plans to release the child for adoption, and secure custody of the child.

The burden of decision-making rests heavily upon the unmarried mother at a time when her body and mind are subjected to the physical and emotional stresses of pregnancy. Those stresses are reflected in the suicide rate of teenage mothers. The State, by establishing substantive legal rules which place the rights of the child over the rights of the biological parents, furthers its interest in preserving the physical and mental health of out-of-

wedlock mothers by giving them needed assurance that, in the event of a conflict with the child's father, the court will base its decision on what is best for the child.

The State's interest in protecting the mother's physical and mental health is related to the State's interest in protecting the health of the unborn child.[22] The mother's physical and mental health may have a significant effect on the child's growth and development. Mothers who conceal pregnancy by starving themselves starve their unborn children as well. Emotionally insecure mothers who indulge during pregnancy in drugs or alcohol as an escape from their problems can do irreversible damage to their unborn children.

The unwed mother, in deciding between birth and abortion, desperately needs assurance that, if she chooses life for the child, her plans for the child's future cannot be vetoed unless a judge or jury finds that it would be in the child's best interest to do so. In making child care plans for the child, the unwed mother should be allowed to consider all her options—keeping the child, allowing the father to raise the child, or placing the child for adoption—with assurance that the plan she chooses will not be overridden without a judicial determination that it would be in the child's best interest to do so.

The State, by requiring proof of best interest before overriding a mother's refusal to consent to voluntary legitimation, allows the unwed mother during pregnancy and after birth to know that her plans for the child will not be frustrated unless a judge or jury finds that the child's welfare will be promoted by so doing. Given the realities of out-of-wedlock conception, pregnancy, and birth, requiring the father to prove best interest in cases in which no family unit has ever existed is more than fair.

The mother who wishes to avoid the stigma of raising an out-of-wedlock child will undoubtedly wish to avoid the even greater stigma of having the father raise the child in

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[22] The State has an interest in protecting potential life. *Roe v. Wade, supra,* 410 U.S. at 154.

her home town. She may feel "coerced by circumstances" into getting an abortion she does not desire. In getting that abortion, she may abandon long held religious beliefs and alienate family members and friends who believe that abortion is equivalent to murder. If such a mother seeks adoption instead of abortion as her plan for the child and a neutral fact finder determines that adoption is best for the child, the Equal Protection Clause does not compel turning the child over to the child's father, whose illegal conduct or sexual irresponsibility was responsible for creating the problem in the first place. For men and women who desire less interference from the State in their private affairs, the "safe harbor" of marriage is always available.

No unwed mother should be "coerced by circumstances" into raising a child she does not wish to raise. Many unwed mothers feel that adoption is the best option for their children and that the second best option would be raising their children themselves. They may feel, correctly or incorrectly, that the worst alternative for the child would be releasing the child to the child's father and his family. Realizing that by seeking adoption she increases the probability that the father will be able to win custody of the child, such a mother is likely to "settle for second best," reject adoption as an alternative, and raise the child herself in order to protect the child from what she considers to be the worst alternative. This may be tragic for the child if the mother is physically and emotionally unprepared for parenthood, and if she blames the child for interfering with her continued education, career opportunities, and ability to find a compatible mate.[23] If

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[23] There is no requirement under Texas law that a mother notify the biological father of her pregnancy. If she wishes to avoid the risk of the biological father's becoming involved, nothing stops her from moving to another community and disappearing entirely. She may then raise the child without risk of interference by the father. Only if she chooses to seek child support from the father or to place the child for adoption must she notify the father of the pregnancy.

the mother, seeking what is best for the child, runs the risks involved in placing a child for adoption, she needs assurance that her plans will not be defeated without proof that the child will benefit by overriding her decisions.

The only significant difference between the rights of men and women under Texas legitimation law is that in contested legitimation cases the biological father must satisfy the best interest test in order to acquire parental rights. This apparent inequality is more illusory than real. The mother cannot stop the father from acquiring full parental rights unless it is in the child's best interest that he be denied them. When the mother seeks to place a child for adoption and the father seeks to legitimate the child, neither party can prevail without proof of best interest. The statute in context operates neutrally.

TEX. FAM. CODE ANN. §13.21 (Supp. 1982-83) does not explicitly assign the burden of proof to either party.[24] Placing the burden of proof on the father makes sense. He is the petitioner seeking relief. He has more access than anyone else to information about himself and he has access to all the discovery tools available to litigants in civil cases generally. If he fails to use these tools wisely, and if he fails to present a satisfactory case at trial, he has no one to blame but himself. Ordinarily, the burden of proof must fall somewhere. In legitimation cases, it is fair to place that burden on the father.

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[24] The Texas Supreme Court has not assigned the burden of proof and has not been called upon to decide where that burden should fall. See *In the Interest of K*, 535 S.W. 2d 168 (Tex. 1976), *cert. den.* 429 U.S. 907 (1976), and *In the Interest of T.E.T.*, 603 S.W. 2d 793 (Tex. 1980), *cert. den. sub nom. Oldag v. Catholic Charities*, 450 U.S. 1025 (1980).

One Texas appellate court, in a case not reviewed by the Texas Supreme Court, has held that the burden of proof falls upon the party petitioning for legitimation. *In the Interest of C____ D____ V____*, 589 S.W. 2d 543, 547 (Tex. Civ. App.—Amarillo 1979, no writ).

The Texas voluntary legitimation statute makes a legitimate, appropriate, and necessary gender-based distinction between mothers and fathers of out-of-wedlock children. The inequality established by that differentiation is minimal, reflects the reality that men and women are not similarly situated with respect to the problems and risks of out-of-wedlock sexual intercourse and unplanned pregnancy, and is necessary to balance equitably the rights of the child and the child's biological parents without authorizing unwarranted intervention by the State in consensual family relationships. The gender-based distinction can be used only to protect the welfare of the child and cannot be arbitrarily applied to prevent legitimation of an out-of-wedlock child. TEX. FAM. CODE ANN. §13.21 (Supp. 1982-83) as applied to Petitioner Kirkpatrick and men like him is constitutional.

CONCLUSION

For all the foregoing reasons, the National Committee for Adoption, Inc., Amicus Curiae, respectfully requests that this Court affirm the judgment of the courts below and rule that TEX. FAM. CODE ANN. §13.21 (Supp. 1982-83), as applied to the facts of this case, is constitutional.

Respectfully submitted,

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March, 1983

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of March, 1983, three copies of the above and foregoing Amicus Curiae Brief were served by mail on all parties required to be served by depositing same, enclosed in an envelope with first-class postage prepaid, certified, return receipt requested, in an official depository under the care and control of the United States Postal Service, addressed to counsel of record as follows:

Marcia Robinson Lowry
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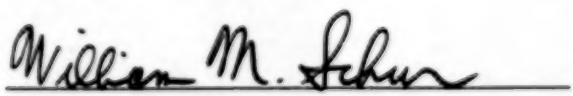
Dated this 22nd day of March, 1983.



William M. Schur

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March 14, 1983

William M. Schur
1200 Oil and Gas Bldg.
Ft. Worth, Texas 76102

Re: Kirkpatrick v. Christian Homes of Abilene, Inc.

Dear Mr. Schur:

As counsel for petitioner Donald Kirkpatrick, I hereby consent to the filing of a brief amicus curiae by the National Committee for Adoption.

Very truly yours,

Marcia Robinson Lowry

Marcia Robinson Lowry

MRL:mab

RHODES & HEATHERLY

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March 16, 1983

Mr. William H. Schur
Attorney at Law
1200 Oil & Gas Building
Fort Worth, TX 76102

Re: Donald J. Kirkpatrick v. Christian Homes of Abilene, Inc.; No. 82-647

Dear Mr. Schur:

I hereby give written consent on behalf of Christian Homes of Abilene, Inc. to your filing of an amicus curiae brief on behalf of The National Committee for Adoption, Inc. in the above referenced cause now before the United States Supreme Court. The filing deadline for Respondent's Brief on the Merits is March 23, 1983.

Yours truly,

RHODES & HEATHERLY

Charles E. Myers
Attorney of Record for
Christian Homes of Abilene, Inc.

brs

The Attorney General of Texas

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An Equal Opportunity/
Affirmative Action Employer

March 16, 1983

Mr. William M. Schur
1200 Oil and Gas Building
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Re: Kirkpatrick v. Christian Homes of Abilene, Inc.

Dear Mr. Schur:

The State of Texas does not oppose the timely filing of an amicus curiae brief on behalf of the National Committee for Adoption.

Sincerely,

David R. Richards
Executive Assistant

DRR/lm
opeiu 298
aflcio

Enc.

No. 82-647-CSX
Status: DECIDED

Title: Donald J. Kirkpatrick, Petitioner
v.
Christian Homes of Abilene, Inc., et al.

Docketed:
October 12, 1982

Court: Court of Appeals of Texas,
Eleventh Supreme Judicial District

Counsel for petitioner: Lowry, Marcia Robinson

Counsel for respondent: Mattox, Jim, Myers, Charles E.

Entry	Date	Note	Proceedings and Orders
1	Oct 12 1982	G	Petition for writ of certiorari filed.
3	Oct 26 1982		Order extending time to file response to petition until November 29, 1982.
4	Nov 26 1982		Brief of respondents Christian Homes, et al. in opposition filed.
5	Dec 1 1982		DISTRIBUTED. January 7, 1983
6	Dec 27 1982	X	Reply brief of petitioner Donald J. Kirkpatrick filed.
7	Dec 23 1982		Record filed.
8	Dec 23 1982		Certified original transcript of record received.
10	Jan 10 1983		REDISTRIBUTED. January 14, 1983
11	Jan 17 1983		Petition GRANTED.
			**********
12	Feb 17 1983		Joint appendix filed.
13	Feb 17 1983		Brief of petitioner Donald J. Kirkpatrick filed.
14	Feb 25 1983	G	Motion of petitioner to direct the Clerk to schedule oral argument during April, 1983 filed.
16	Feb 28 1983		DISTRIBUTED. March 4, 1983. (Above motion)
18	Mar 17 1983		Brief of respondent State of Texas filed.
19	Mar 21 1983		Motion of petitioner to direct the Clerk to schedule oral argument during April, 1983 GRANTED.
21	Mar 25 1983		Brief amicus curiae of Natl. Center on Women & Family Law, et al. filed.
22	Mar 24 1983		CIRCULATED.
23	Mar 25 1983		Brief amicus curiae of Natl. Coun. For Adoption, Inc. filed.
24	Mar 31 1983	D	Motion of Texas for divided argument filed.
25	Mar 31 1983	X	Brief of respondent Christian Homes, et al. filed.
26	Apr 4 1983		Motion of Texas for divided argument DENIED.
27	Apr 5 1983		Petitioner directed to file typewritten memorandum by noon April 8, 1983 responding to question in Clerk's ltr.
28	Apr 8 1983		Petitioners response as requested by the Court received.
29	Apr 12 1983		Adjudged to be VACATED and REMANDED The Court has considered the memorandum filed by petitioner in response to the representations of the State of Texas in its brief before this Court which bring to light a question of state law not passed upon or relied upon below. The resolution of this question may establish that petitioner is entitled to the relief he seeks as a matter of Texas statutory law. If this is so, a decision of the constitutional question on which we granted certiorari would be unnecessary. See Paschall v. Christie-Stewart, 414 U.S. 100 (1973); Musser v. Utah, 333 U.S. 95 (1948). Accordingly, the judgment of the Court of Appeals of Texas, Eleventh Supreme Judicial District, is vacated and the case is remanded to that Court for further proceedings to determine whether, under Texas law, petitioner could have obtained and may still obtain a decree designating him as the father of his child pursuant to the provisions of Texas Family Code Sections 13.01 - 13.09. The Clerk is directed to issue the mandate forthwith.
30	Apr 14 1983		Mandate issued.